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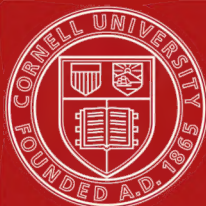
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A COMMENTARY  
ON THE  
INTERPRETATION OF STATUTES,

BY

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FOUNDED ON THE TREATISE OF

SIR PETER BENSON MAXWELL

*Late Chief Justice of the Straits Settlements.*



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## PREFACE.

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Since its first publication in 1875, the treatise of Judge Maxwell "On the Interpretation of Statutes" has deservedly taken high rank in England among the acknowledged authorities upon this branch of the law, and has made its way to judicial recognition in this country. Its simplicity and practical directness in the treatment of an intricate and seemingly abstruse subject would, if there were nothing else to commend the work, distinguish it as one of pre-eminent usefulness to the profession.

The volume herewith submitted is founded upon and embodies the larger portion of that treatise. My original undertaking, indeed, was merely that of an American editor of the English work. While engaged upon that duty, I found the mass of new matter to be incorporated so great and so important to the American lawyer that its relegation to foot-notes appeared impracticable. On the other hand, I ascertained that much in the work of the learned English jurist was inapplicable to the law of this country; that many essentials in the understanding and application, under our system, of the principles of statutory interpretation were neither recognized nor alluded to in his work, because alien to the English jurisprudence; and that certain changes of arrangement might be made with advantage to the American reader. To have interwoven with the original text this mass of new matter, often of a character entirely foreign to anything contemplated by the author; to have omitted portions of his work, no doubt by him regarded as material; to have changed his arrangement, the divisions of his book and the titles he had given them, and still to have called it his work, would have been a wrong to him and to me. The only proper course, it seemed, was to make a new book, which should declare itself to be founded and built upon Judge Maxwell's treatise, in which full credit should be prominently given for all that is derived from it, but which should cast no apparent responsibility upon him for any changes, omissions or additions.

This it is that I have done, and such is the character of the present work. Two-thirds of its matter, in text and notes, are the result of my labors. I have changed the grouping together of subjects in the various chapters, and of course their titles; and whilst, in the main, the order in which the subjects are treated has been retained, in some instances portions of the text have been transferred to other connections or incorporated with foot-notes. The whole has been divided into numbered sections, with appropriate captions, and a new index has been added. Whatever of Judge Maxwell's work I could retain I have retained, as far as possible, literally, preferring always his language to my own. The original notes to the text reproduced are given in full as they appear in the English work, with such trifling corrections as were necessary. And in order to mark and enforce the credit I owe and desire to see given to Judge Maxwell's work, I have enclosed in brackets all the new matter added by me to the original text or notes, and all interpolations or changes of phraseology (except such as substituting "legislature" for "parliament," "government" or "state" for "crown," etc., where such alterations seemed called for in an American book), and have retained the reference to the original notes by letters, whilst numbering the new consecutively throughout the chapter. Transpositions and omissions I could not, of course, indicate without becoming tedious.

In the plan of the work I have labored to carry into the larger and more diversified field of American decisions the system that distinguishes the learned English author's admirable treatise—that of example, which, possibly more in this than in any other subject, excels mere precept. The innumerable maxims and technical rules of statutory interpretation, shrouded for the most part in a dead language, are well enough known. The difficulty is in their application. Judge Maxwell, in his work, has not cast them aside as useless; but he has translated them into a living language, reduced them to a few easily grasped, obvious general principles, and elucidated their force and effect by showing the methods, limits and results of their application in decided cases. I have not, however, confined my view to American decisions, but made a selection of those also of the English courts rendered since the publication of the last edition of Judge Maxwell's work.

Although, in a work of this character, many distinct branches of the law—*e. g.*, Criminal Statute Law, International Law, the Conflict of Laws, the Law of Usury, Contracts, Corporations, &c.—

must be drawn and touched upon more or less in detail, I disclaim for this work any pretensions to be regarded as containing exhaustive examinations of any collateral and independent topics of legal discussion. They are introduced only as incidental to and illustrative of the general subject, the interpretation of statutes. Nor, in my opinion, does this subject involve that of constitutional interpretation. The latter, therefore, has been excluded, except in the last chapter, where it is entered into for the purpose and to the extent of pointing out the differences and analogies existing between the two.

The text-books I have principally used and referred to are the following : Bishop, *Written Laws and their Interpretation*, 1882 (cited as Bish., W. L.) ; Buckalew, *Constitution of Pennsylvania*, 1883 (cited as Buckalew, Const. of Pa.) ; Cooley, *Constitutional Limitations* (5th ed.), 1883 (cited as Cooley, C. L.) ; Field, *Constitution and Jurisdiction of the Courts of the United States*, 1883 (cited as Field, Fed. Cts.) ; Jarman, *Wills* (5th Am. ed., Randolph & Talcott), 1880 (cited as Jarm., Wills) ; Potter's *Dwarris, Statutes and Constitutions*, 1871 (cited as Potter's Dwarris) ; Sedgwick, *Interpretation and Construction of Statutory and Constitutional Law* (2d, Pomeroy's, ed.), 1874 (cited as Sedgw.) ; Wilberforce, *Statute Law*, London, 1881 (cited as Wilb., S. L., or merely Wilb.).

G. A. E.

READING, PA., May 1st, 1888.





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# INTERPRETATION OF STATUTES.

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## CHAPTER I.

### LITERAL INTERPRETATION.

- § 1. Introductory.
- § 2. Primary Rule of Literal Interpretation.
- § 3. Common Law Meaning of Words.
- § 4. Language admitting of only one Meaning.
- § 5. Considerations of Policy.
- § 6. Consequences.
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- § 9. Application of the Principle of Literal Interpretation.
- § 17. Exceptions.
- § 18. Additions.
- § 23. Effect to be given to every word, etc.
- § 24. Insensible Enactments.

§ 1. **Introductory.**—STATUTE law is the will of the Legislature;<sup>1</sup> and the object of all judicial interpretation of it is

<sup>1</sup> "Statute Law may, we think, be properly defined as the will of the nation expressed by the Legislature, expounded by Courts of justice. The Legislature, as the representative of the nation, expresses the national will by means of statutes. Those statutes are expounded by the Courts so as to form the body of the Statute Law" (Wilberforce, *Statute Law*, p. 8). It has been said, that,

"after a statute has been settled by judicial construction, the construction becomes, so far as contract rights acquired under it are concerned, as much a part of the statute as the text itself, and a change of decision is to all intents and purposes the same in its effect on contracts as an amendment of the law by means of a legislative enactment" (*Douglass v. Pike Co.*, 101 U. S. 677, 687; and see much

to determine what intention is conveyed, either expressly or by implication, by the language used, so far as it is necessary for determining whether the particular case or state of

to the same effect as to settled and uniform practice and usage under a statute, *Taylor v. Thomson*, 5 Pet. 358; so that, where a decision of the supreme judicial tribunal of a state announced a certain rule as resulting from the construction of a statute, and a contract was entered into upon the basis of that decision, it was held unaffected by a subsequent overruling of the decision (*Geddes v. Brown*, 5 Phila. [Pa.] 180). But the object of all judicial exposition of statutes is the ascertaining of the meaning of the language used by the Legislature. It neither adds to, nor changes its true significance, but discovers and declares the same. The statute, therefore, as expounded, is the law, and the aggregate of all statutes in force and the judicial expositions thereof form the body of the Statute Law of the state or nation. It is in this sense that the law is a solemn expression of the will of the supreme power in the state (Cal. Pol. Code, § 4466). Where, however, the supreme law of the land is not the will of the Legislature, or the will of the people expressed by the Legislature, but the Constitution, it is not every statute, however clearly expounded, that is part of the law, but only such as conflict with no constitutional prohibition and conform to constitutional requirements. Whilst it is no part of the purpose of this work to enter upon questions of constitutional law, it is impossible to overlook this restriction in framing a proper definition, of what is, in this country, statute law. "Statute law, by American definitions, is an act which is prescribed by the legislature, or supreme power of the State" (Potter's *Dwarris on Statutes and Constitutions*, p. 35). Irrespectively of the obvious criticism that "statute law" cannot be "an act which is prescribed," but must be that which prescribes an act, it is submitted that this definition

falls short of accuracy in that it overlooks the element of constitutional limitations and the identification of judicial expositions with the body of the statute law. It would seem that an acceptable definition of the latter would be that which describes statute law as being the will of the people conforming with its constitution, expressed, in accordance with constitutional requirements, by the Legislature, and expounded by Courts of justice. This, however, is the body of the statute law, which, by its terms, includes the judicial expositions already made, of the individual statutes. The object of this treatise is to elucidate the principles upon which these expositions that go to form part and parcel of the statute law of a state or nation are to proceed, in the individual cases in which they may be called for. The question, therefore, should not be: What is statute law?—but, What is a statute? A statute which lacks the formal requisites needful in order to give it the effect of a law, cannot fall under the construction of a court of justice as a law. It is not a statute within the meaning of a work upon the interpretation of statutes. But a statute which is unconstitutional in its objects, although it can form no part of the statute law of the state or nation, is nevertheless a statute for the purposes of construction, until ascertained to be void. A definition of statutes, for this purpose, may consequently discard the element of constitutionality, so far as relates to the substance of the enactment (except, in so far as the presumption against unconstitutional design affects the construction of the language: see post, §§ 178–181), but must take into account the element of constitutionality, so far as relates to the formal requisites of the enactment. It is believed that the definition of a statute as "The written will of the

facts presented to the interpreter falls within it. When the intention is expressed, the task is one of verbal construction only; but when, as occasionally happens, the statute expresses no intention on a question to which it gives rise, and on which some intention must necessarily be imputed to the Legislature, the interpreter has to determine it by inference grounded on certain legal principles. An Act, for instance, which imposes a penalty, recoverable summarily, on every tradesman, laborer and other person who carries on his worldly calling on a Sunday would give rise to a question of the former kind, when it had to be determined whether the class of persons to which the accused belonged was comprised in the prohibition. But two other questions arise out of the prohibition: is the offender indictable as well as punishable summarily? and, is the validity of a contract entered into in contravention of the Act, affected by it? On these corollaries or necessary inferences from its enactment the Legislature, though silent, must nevertheless be held to have entertained some intention, and the interpreter is bound to determine what it was.

The subject of the interpretation of a statute seems thus to fall under two general heads: what are the principles which govern the construction of the language of an Act of Parliament; and next, what are those which guide the interpreter in gathering the intention on those incidental points on which the Legislature is necessarily presumed to have entertained one, but on which it has not expressed any.<sup>2</sup>

Legislature solemnly expressed according to the forms necessary to constitute it the law of the state" (2 Bouvier, Law Dict. p. 543), is unexceptionable. And in this sense the phrase "Statute law," in the opening sentence of this work, is to be understood.

<sup>2</sup> "Interpretation differs from construction in that the former is the art of finding out the true sense of any form of words; that is, the sense which their author intended to convey; and of enabling others to derive from them the same idea which the author intended to con-

vey. Construction, on the other hand, is the drawing of conclusions, respecting subjects that lie beyond the direct expressions of the text, from elements known from and given in the text. Interpretation only takes place if the text conveys some meaning or other. But construction is resorted to, when, in comparing two different writings of the same individual, or two different enactments by the same legislative body, there is found contradiction where there was evidently no intention of such contradiction one of another, or

§ 2. **Primary Rule of Literal Interpretation.**—The first and most elementary rule of construction is, that it is to be assumed that the words and phrases are used in their technical meaning if they have acquired one, and in their popular meaning if they have not, and that the phrases and sentences are to be construed according to the rules of grammar; and from this presumption it is not allowable to depart, unless adequate grounds are found, either in the context or in the consequences which would result from the literal interpretation, for concluding that that interpretation does not give the real intention of the Legislature (*a*). [It is said that the fixed technical meaning of a word must be given to it when used in a statute, unless the context shows an intention to use it in a different sense;<sup>3</sup> whilst, under a similar limitation<sup>4</sup> words of common use<sup>5</sup> are to be under-

where it happens that part of a writing or declaration contradicts the rest. When this is the case, and the nature of the document or declaration, or whatever else it may be, is such as not to allow us to consider the whole as being invalidated by a partial or other contradiction, then resort must be had to construction; so, too, if required to act in cases which have not been foreseen by the framers of those rules, by which we are nevertheless obliged, for some binding reason, faithfully to regulate as well as we can our action respecting the unforeseen case. In common use, however, the word *construction* is generally employed in the law in a sense embracing all that is properly covered by both when each is used in a sense strictly and technically correct:” Cooley, Const. Lim. 49-50,—and, it may be added, in common use, the words *construction* and *interpretation* are used as synonymous and interchangeable. *They are so used throughout this work.*

(*a*) Bac. Ab. Statute, I. 2; Grot. b. 2, c. 16, ss. 2, 3; Puff. L. N. b. 5, c. 12; Warburton v. Loveland, Huds. & Br. 648; Becke v. Smith, 2 M. & W. 191; Everett v. Wells, 2 M. & Gr. 269; R. v. Pease, 4 B. & Ad. 41; McDougal v. Paterson,

11 C. B. 755, 2 L. M. & P. 681; Mallan v. May, 13 M. & W. 511; Mattison v. Hart, 14 C. B. 385; *per* Maule, J., in Jeffreys v. Boosey, 4 H. L. 815, 24 L. J. Ex. 89; *per* Lord Wensleydale in Grey v. Pearson, 6 H. L. 106, 26 L. J. Ch. 481, and Abbott v. Middleton, 7 H. L. 114, 28 L. J. Ch. 110; R. v. Millis, 10 Cl. & F. 749, *per* Lord Brougham; Attorney-General v. Westminster Chambers Assoc., 1 Ex. D. 476, *per* Jessel, M. R.; Cull v. Austin, L. R. 7 C. P. 234; R. v. Castro, L. R. 9 Q. B. 360. [A statutory rule that “all words and phrases shall be construed and understood according to the common and approved usage of language” is said to be merely declaratory of the common law on the subject: Bailey v. Com’t, 11 Bush. (Ky.) 688.]

<sup>3</sup> Exp. Hall, 1 Pick. (Mass.) 261; Brocket v. R. R. Co., 14 Pa. St. 241; State v. Smith, 5 Humph. (Tenn.) 261.

<sup>4</sup> Allen v. Ins. Co., 3 Md. 111.

<sup>5</sup> Schriefer v. Wood, 5 Blatchf. 215; Wetumpka v. Winter, 29 Ala. 651; Favers v. Glass, 22 Id. 621; Green v. Miller, 32 Miss. 650; Quigley v. Gorham, 5 Cal. 418; Gross v. Fowler, 21 Id. 392; Canal Co. v. Schroeder, 7 La. An. 615; Parkinson v. State, 14 Md.



stood in their natural, plain, ordinary and genuine significance as applied to the subject matter of the enactment.\*]

§ 3. **Common Law Meaning of Words.**—[Where a term used in a statute has acquired at common law a settled meaning, that is ordinarily the technical meaning which is to be given to it in construing the statute.] Thus it was held, that, in ascertaining who is meant by “next of kin,” under a statute of descents and distributions of Illinois, the computation must be made according to the rules of the common law, which includes only those who are legitimate, unless a different intention is clearly manifested;<sup>8</sup> that the grant by a statute of a right to a railroad company to enter upon land and to appropriate so much thereof as might be necessary for its railroad, included, according to the common law significance of the word land as embracing everything fixed to the ground, the right to remove a dwelling house;<sup>9</sup> that a statute authorizing courts to grant divorces where the alleged marriage “was procured by fraud” must be understood to mean such fraud as would, at common law, render the marriage void;<sup>10</sup> that a statute giving dower in lands of which the husband was seized would not include those in which his interest was a mere contingent remainder;<sup>11</sup> that an act authorizing a sale of land on the second Monday after the “term” of court at which judgment was rendered would be complied with by a sale, on the second Monday after the first or last day of the term, a term being in law regarded as one day.<sup>12</sup> The reason, in all such cases, for

184; *Engelking v. Von Wamel*, 26 Tex. 469.

<sup>8</sup> *Op. of Justices*, 7 Mass. 523. See as to construction of words in their technical or popular sense, post, §§ 74-79.

<sup>9</sup> *Rice v. R. R. Co.*, 1 Black 358; *McCool v. Smith*, Id. 459; *U. S. v. Magill*, 1 Wash. 463; 4 Dall. 426; *Exp. Vincent*, 26 Ala. 145; *Brocket v. R. R. Co.*, 14 Pa. St. 241; *Allen's App.*, 99 Id. 196; *Adams v. Turrentine*, 8 Ired. L. (N. C.) 147; *Apple v. Apple*, 1 Head (Tenn.) 348. And an act adopting the common law adopts the English common law, not that

of the civilians, etc.: *Lux v. Haggin*, 69 Cal. 255.

<sup>8</sup> *McCool v. Smith*, supra.

<sup>9</sup> *Brocket v. R. R. Co.*, supra.

<sup>10</sup> *Allen's App.*, supra: thus excluding the case of mere incontinence on the part of the wife before marriage and failure on her part to tell her intended husband about it, but making it a question for the jury whether or not there was fraud in a case of actual pregnancy, resulting from such incontinence, at the time of marriage, and failure to disclose the same: *Ibid.*

<sup>11</sup> *Apple v. Apple*, supra.

<sup>12</sup> *Bestor v. Powell*, 7 Ill. 119.

adopting the technical, common law sense of words is, "because they have a definite meaning, which is supposed to have been understood by those who were, or ought to have been learned in the law."<sup>13</sup> And the rule applies equally in State and Federal Courts, as to statutes of state legislatures and of Congress;<sup>14</sup> the exception in all cases of construction of state laws being where by constitutional provision the rules of the common law are made inapplicable as rules of construction.<sup>15</sup> Accordingly the meaning of "murder," "robbery," in an act of Congress, unexplained, is to be determined by the common law,<sup>16</sup> and so the word "forfeiture," with relation to the time when the same should take effect as to personalty or realty, when the statute leaves the intention of Congress in this particular undefined.<sup>17</sup>

§ 4. *Language admitting of only one meaning.*—When, indeed, the language is not only plain but admits of but one meaning, the task of interpretation can hardly be said to arise [and "those incidental rules which are mere aids, to be invoked when the meaning is clouded, are not to be regarded"<sup>18</sup>]. It is not allowable, says Vattel, to interpret what has no need of interpretation (*a*). *Absoluta sententia expositore non eget* (*b*). Such language best declares, without more, the intention of the lawgiver, and is decisive of it (*c*). The Legislature must be intended to mean what it has plainly expressed, and consequently there is no room for construction (*d*). [It is, therefore, only in the construction of statutes whose terms give rise to some ambiguity, or whose grammatical construction is doubtful,<sup>19</sup> that courts can exercise the power of controlling the language in order to give effect

<sup>13</sup> *Brocket v. R. R. Co.*, supra, p. 243.

<sup>14</sup> See *McCool v. Smith*, supra; *Rice v. R. R. Co.*, supra.

<sup>15</sup> *Rice v. R. R. Co.*, supra.

<sup>16</sup> *U. S. v. Magill*, supra; *U. S. v. Jones*, 8 Wash. 209.

<sup>17</sup> *The Kate Heron*, 6 Sawyer 106.

<sup>18</sup> *Western Un. Tel. Co. v. District of Columbia*, 2 Centr. Rep. 694.

(*a*) *Law of N.*, b. 2, s. 263.

(*b*) 2 Inst. 533.

(*c*) *Per Buller, J.*, in *R. v. Hod-*

*nett*, 1 T. R. 96; *The Sussex Peerage*, 11 Cl. & F. 143; *U. S. v. Hartwell*, 6 Wallace, 395; *U. S. v. Wiltberger*, 5 Wheat. 95. [*Dryfus v. Bridges*, 45 Miss. 247.]

(*d*) *Per Parke, J.*, in *R. v. Banbury*, 1 A. & E. 142; *per Cur. in Fisher v. Bright*, 2 Cranch, 399. [*Sedgw.*, 194; *Case v. Wildridge*, 4 Ind. 51.]

<sup>19</sup> *George v. B'd of Educ.*, 33 Ga. 344.

to what they suppose to have been the real intention of the law makers.<sup>20</sup> Where the words of a statute are plainly expressive of an intent, not rendered dubious by the context,<sup>21</sup> the interpretation must conform to and carry out that intent.<sup>22</sup> It matters not, in such a case, what the consequences may be.<sup>23</sup> "It has, therefore, been distinctly stated, from early times down to the present day, that judges are not to mould the language of statutes in order to meet an alleged convenience or an alleged equity; are not to be influenced by any notions of hardship, or of what in their view is right and reasonable or is prejudicial to society; are not to alter clear words, though the Legislature may not have contemplated the consequences of using them; are not to tamper with words for the purpose of giving them a construction which is 'supposed to be more consonant with justice' than their ordinary meaning."<sup>24</sup>] Where, by the use of clear and unequivocal language, capable of only one meaning, anything is enacted by the Legislature, it must be enforced, even though it be absurd or mischievous (a). If the words go beyond what was probably the intention, effect must nevertheless be given to them (b). They cannot be construed,

<sup>20</sup> *Newell v. People*, 7 N. Y. 97; *Barstow v. Smith, Walk.* (Mich.) 394; *Bidwell v. Whittaker*, 1 Mich. 469; and see also *McCluskey v. Cromwell*, 11 N. Y. 593.

<sup>21</sup> *Douglass v. Chosen Freeholders*, 38 N. J. L. 214.

<sup>22</sup> *Bradbury v. Wagenhorst*, 54 Pa. St. 182; *S. P., U. S. v. Warner*, 4 McLean, 463; *U. S. v. Ragsdale, Hempst.* 497; *Johnson v. R. R. Co.*, 49 N. Y. 455; *People v. Shoonmaker*, 63 Barb. (N. Y.) 49; *Pearce v. Atwood*, 13 Mass. 324; *Doane v. Phillips*, 12 Pick. (Mass.) 223; *Bartlett v. Morris*, 9 Port. (Ala.) 266; *Howard Association's App.*, 70 Pa. St. 344; *Farrell Foundry v. Dart*, 26 Conn. 376; *Fitzpatrick v. Gibhart*, 7 Kan. 35; *State v. Washoe Co.*, 6 Nev. 104.

<sup>23</sup> *Hyatt v. Taylor*, 42 N. Y. 259; *Benton v. Wickwire*, 54 Id. 226; *Rosenplaenter v. Rossele*, Id. 262; *Rogers v. Goodwin*, 2 Mass. 475; *Langdon v. Potter*, 3 Id. 215, 221; *Gore v. Brazier*, Id.

523; *Ayers v. Knox*, 7 Id. 306; *Putnam v. Longley*, 11 Pick. (Mass.) 487, 490; *Kirlpatrick v. Byrne*, 25 Miss. 57; *Tyman v. Walker*, 35 Cal. 634; *Coffin v. Rich*, 45 Me. 507; *Encking v. Simmons*, 28 Wis. 272; *Collins v. Carman*, 5 Md. 503; *Bosley v. Mattingley*, 14 B. Mon. (Ky.) 89; *Dudley v. Reynolds*, 1 Kan. 285; *R. v. Tonbridge Overseers*, L. R. 3 Q. B. D. 342; and see cases in two preceding notes.

<sup>24</sup> *Wilberforce*, Stat. Law, p. 116.

(a) *Per Lord Campbell* in *R. v. Skeen*, 28 L. J. M. C. 94, Bell, 97; *per Jervis, C. J.*, in *Abley v. Dale*, 11 C. B. 391, 2 L. M. & P. 443, 21 L. J. 104; *per Pollock, C. B.*, in *Miller v. Sulomons*, 7 Ex. 475, 21 L. J. Ex. 197; *per Lord Brougham* in *Gwynne v. Burnell*, 6 Bing. N. C. 559; *Re British Farmers, &c. Co.*, 48 L. J. Ch. 56, and *Crawford v. Spooner*, 6 Moo. 9. See *Sneed v. Com.*, 6 Dana (Ky.) 339.

(b) *Nolly v. Buck*, 8 B. & C. 164

contrary to their meaning, as embracing or excluding cases merely because no good reason appears why they should be excluded or embraced (*a*). However unjust, arbitrary or inconvenient the intention conveyed may be, it must receive its full effect (*b*). [Indeed, it is said that it is only when all other means of ascertaining the legislative intent fail, that courts may look to the effects of a law in order to influence their construction of it.<sup>25</sup> But, whilst it may be conceded, that, where its provisions are ambiguous and the legislative intent is doubtful, the effect of several possible constructions may be looked at, in order to determine the choice,<sup>26</sup> it is very certain, that] when once the intention is plain, it is not the province of a Court to scan its wisdom or its policy (*c*). Its duty is not to make the law reasonable, but to expound it as it stands, according to the real sense of the words (*d*).

§ 5. **Considerations of Policy.**—[What is called the “policy” of the government, with reference to any particular legislation, is said to be too unstable a foundation for the construction of a statute.<sup>27</sup> The clear language of a statute can be neither restrained nor extended by any consideration of supposed wisdom or policy.<sup>28</sup> So long as a legislative enactment violates no constitutional provision or principle, it

(*a*) *Pike v. Hoare*, Eden, 184, *per* Lord Northington; *per* Cur. in Dean *v. Reid*, 10 Peters, 524. [*Ogden v. Strong*, 2 Paine, 584.]

(*b*) *The Ornamental Woodwork Co. v. Brown*, 2 H. & C. 63; 32 L. J. Ex. 190, *per* Martin, B., and Bramwell, B.; *Mirehouse v. Rennell*, 1 Cl. & F. 546, *per* Parke, J.; *R. v. The Poor Law Commissioners*, 6 A. & E. 7; *Biffin v. Yorke*, 5 Man. & Gr. 437, *per* Erskine, J.; *May v. Grant*, L. R. 7 Q. B. 377.

(*c*) *Per* Lord Ellenborough in *R. v. Watson*, 7 East, 214, and *R. v. Staffordshire*, 12 East, 572; *R. v. Holnett*, 1 T. R. 100, *per* Lord Mansfield; *R. v. Worcestershire*, 3 P. & D. 465, 12 A. & E. 283, *per* Lord Denman; *per* Bramwell, B., in *Archer v. James*, 2 B. & S. 61; *Miller v. Salomons*, 7 Ex. 475. *per* Pollock, C. B.; *Exp. Attwater*, 5 Ch. D. 30, *per* James, L. J.

<sup>25</sup> *Dudley v. Reynolds*, 1 Kan. 285.

<sup>26</sup> See *Gore v. Bazier*, 3 Mass. 523, 539; *Langdon v. Potter*, Id. 215, 221; *Collins v. Carman*, 5 Md. 503; *Cearfoss v. State*, 42 Id. 403; *Bosley v. Maitingley*, 14 B. Mon. (Ky.) 89; and post, §§ 113 et seq. (*d*) *Biffin v. Yorke*, 6 Scott, N. R. 234, 5 M. & Gr. 428, *per* Cresswell, J. See ex. gr. *Plasterers' Co. v. Parish Clerks' Co.*, 6 Ex. 630, 20 L. J. 362. [See post, § 8.]

<sup>27</sup> *Hadden v. Collector*, 5 Wall. 107; *Munic. Build. Soc'y v. Kent*, L. R. 9 App. Cas. 273.

<sup>28</sup> *Hadden v. Collector*, *supra*; *Hyatt v. Taylor*, 42 N. Y. 259; *Horton v. School Comm'rs*, 43 Ala. 598; *Com'th v. Shopp*, 2 Woodw. (Pa.) 123; *Re Powers*, 25 Vt. 265; *State v. Liedke*, 9 Neb. 468; *Reynolds v. Holland*, 35 Ark. 56; *Miller v. Childress*, 2 Humph. (Tenn.) 320.

must be deemed its own sufficient and conclusive evidence of the justice, propriety and policy of its passage.<sup>29</sup> The language of Mr. Justice Story, concerning constitutional construction, applies almost equally to that of statutes: "Arguments drawn from impolicy or inconvenience ought here to be of no weight. The only sound principle is to declare *ita lex scripta est*, to follow and to obey; nor, if a principle so just could be overlooked, could there be well found a more unsafe guide or practice than mere policy and convenience. Men on such subjects complexionally differ from each other. The same men differ from themselves at different times. . . . The policy of one age may ill suit the wishes or the policy of another."<sup>30</sup>]

§ 6. *Consequences.*—It has been said that though vested rights are divested, those who have to interpret the law must give effect to it (a). And they are bound to do this even when they suspect (on conjectural grounds only) that the language does not faithfully express what was the real intention of the Legislature when it passed the Act, or would have been its intention if the specific case had been proposed to it. ["Even when a court is convinced that the Legislature really meant and intended something not expressed by the phraseology of the Act, it will not deem itself authorized to depart from the plain meaning of the language which is free from ambiguity."<sup>31</sup>] "It may have been an oversight in the framers of the Act," says Parke, B., in one case, "but we must construe it according to its plain and obvious meaning" (b). [Though the consequence should be to

<sup>29</sup> Flint, &c., Co. v. Woodhull, 25 Mich. 99. S. P., People v. Hayden, 50 N. Y. 525; People v. Briggs, Id. 553; Re Lower Chatham, 35 N. J. L. 497; Jewell v. Weed, 18 Minn. 272; and see Baxter v. Tripp, 12 R. I. 310.

<sup>30</sup> Story, Const., § 426; post, §§ 507, 524. See Jersey City, etc. Co. v. Consumer's Gas Co., 40 N. J. Eq. 427, where it is said, that, in the construction of a statute, a purpose to disregard what is recognized as sound public policy, shall not be attributed to the Legislature except upon most cogent evidence. There

can, of course, be no more "cogent evidence," than the plain, unambiguous language of the Legislature itself.

(a) Midland R. Co. v. Pye, 10 Q. B. N. S. 179, per Erle, C. J. [See post, § 283.]

<sup>31</sup> Smith v. State, 66 Md. 215, 217. S. P., Bradbury v. Wagenhorst, 54 Pa. St. 182; Woodbury v. Berry, 18 Ohio St. 456. And see St. Louis, etc. R. Co. v. Clark, 53 Mo. 214; Hicks v. Jamison, 10 Mo. App. 35.

(b) Nixon v. Phillips, 21 L. J. Ex. 90, 7 Ex. 192.

defeat the object of the act, a construction not supported by the language of it cannot be imposed by the court in order to effectuate what it may suppose to be the intention of the Legislature.”] “Our decision,” says Lord Tenterden (*a*), “may, in this particular case, operate to defeat the object of the Act; but it is better to abide by this consequence than to put upon it a construction not warranted by the words of the Act, in order to give effect to what we may suppose to have been the intention of the Legislature.” [A fortiori, where a statute, in language, clear, positive and direct and leading to no absurdity, gives a suitable remedy for an existing evil, though an inadequate one, a construction, which, upon the ground of a supposed intention of the Legislature to give a more effectual one, would undertake to enlarge the terms of the Act, would be unwarranted;” and especially in the case of penal statutes, a failure of justice resulting from the grammatical and natural meaning of their terms cannot be obviated by a construction which would extend the language beyond such meaning.” Again,] “I cannot doubt,” says Lord Campbell, (*b*) “what the intention of the Legislature was; but that intention has not been carried into effect by the language used. . . . It is far better that we should abide by the words of a statute, than seek to reform it according to the supposed intention.” “The Act,” says Lord Abinger, in another case (*c*), “has practically had a very pernicious effect not at all contemplated; but we cannot construe it according to that result.””

§ 7. In short, when the words admit of but one meaning, a Court is not at liberty to speculate on the intention of the Legislature, or to construe an Act according to its own notions of what ought to have been enacted (*d*). Nothing

<sup>32</sup> *Frye v. R. R. Co.*, 73 *Ill.* 399; *Leoni v. Taylor*, 20 *Mich.* 148.

(*a*) *R. v. Barham*, 8 *B. & C.* 99; and see *per Bayley, J.*, in *R. v. Stoke Damarel*, 7 *B. & C.* 569.

<sup>33</sup> *Ezekiel v. Dixon*, 3 *Ga.* 146.

<sup>34</sup> *Remington v. State*, 1 *Oreg.* 281. And see post, § 155.

(*b*) *Coe v. Lawrence*, 1 *E. & B.* 516, 22 *L. J.* 140.

(*c*) *Atty. Genl v Lockwood*, 9

*M. & W.* 395. See also *per Lord Denman*, in *R. v. Mabe*, 3 *A. & E.* 531.

<sup>35</sup> See a most able discussion of the principle under examination in the dissenting opinion of Mr. Justice Green, in *Penna. R. R. Co. v. Pittsburgh*, 104 *Pa. St.* 522, 543, seq.

(*d*) *Per Cur.* in *York & N. Midland R. Co. v. R.*, 1 *E. & B.* 864 22 *L. J. Q. B.* 230.

could be more dangerous than to make such considerations the ground of construing an enactment that is quite complete and unambiguous in itself. ["The moment we depart from the plain words of the statute, according to their ordinary and grammatical meaning, in a hunt for some intention founded on the general policy of the law, we find ourselves involved in a 'sea of troubles.' Difficulties and contradictions meet us at every turn."<sup>36</sup> Indeed,] to depart from the meaning on account of such views, is, in truth, not to construe the Act, but to alter it (*a*). But the business of the interpreter is not to improve the statute; it is, to expound it. [Whilst he is to seek for the intention of the Legislature,<sup>37</sup> that intention is not to be ascertained at the expense of the clear meaning of the words.<sup>38</sup>] The question for him is not what the Legislature meant, but what its language means (*b*).

§ 8. Language. Intent. Judicial Legislation.—[It is inaccurate to speak of the meaning or intent of a statute as something separate or distinct from the meaning of its language. "The intention of the Legislature is to be ascertained by means of the words which it has used, and though these words are often modified, though their literal sense is not always adopted, though they are sometimes strained, transported, treated as inadequate or as superfluous, they are still the only interpreters of the mind of the Legislature."<sup>39</sup> "Index animi sermo."<sup>40</sup> "The court knows nothing of the intention of an act, except from the words in which it is expressed, applied to the facts existing at the time;"<sup>41</sup> "the meaning of the law being the law itself."<sup>42</sup> It is upon this ground that the rule must have its rational foundation,

<sup>36</sup> Dame's App. 62 Pa. St. 417, 422, per Sharswood, J.

(*a*) *Per* Lord Brougham in Gwynne v. Burnell, 6 Bing. N. C. 56; *per* Lord Westbury in Exp. St. Sepulchre's, 33 L. J. Ch. 373; *per* Grove, J., in Allkins v. Jupe, L. R. 2 C. P. 385.

<sup>37</sup> James v. Patten, 6 N. Y. 9, 13.

<sup>38</sup> Leoni v. Taylor, 20 Mich. 148; S. P., Frye v. R. R. Co., 73 Ill. 399.

(*b*) Wigram, Interp. Wills, p. 7;

*per* Cockburn, C. J., in Palmer v. Thatchett, 3 Q. B. D. 353, 47 L. J. M. C. 58; *per* Lord Coleridge, in Coxhead v. Mullis, 3 C. P. D. 419, 7 L. J. 761.

<sup>39</sup> Wilberforce, Stat. Law, p. 102.

<sup>40</sup> Edrich's Case, 5 Rep. at p. 118 b.

<sup>41</sup> Logan v. Earl Courtown 13 Beav. 22.

<sup>42</sup> Reiser v. Saving Fund Ass'n 39 Pa. St. 137, 144.

which, where the words can bear but one meaning, declares that there is no room for interpretation. If the construction of a statute were not essentially the construction of its language, there could be no reason for binding a court to the clear meaning of an act working an injustice or inconvenience unforeseen by the Legislature. Yet it is clear, that,] to give it a construction contrary to, or different from that which the words import or can possibly import, is not to interpret law, but to make it; and Judges are to remember that their office is *jus dicere*, not *jus dare* (a). [Every departure from the clear language of a statute is, in effect, an assumption of legislative powers by the court." It has, indeed, been intimated that this is the case wherever the court permits the consideration of consequences to dictate the construction of a doubtful act." "The judge must decide, but the law has not spoken. It is evident that his functions necessarily become to a certain extent legislative.""<sup>45</sup> It is submitted, however, that this is inaccurate. If the judge were to guess at the interpretation, and arbitrarily fix the result, no doubt it would be true that he would be assuming the functions of a legislator. But so long as the interpretation of an ambiguous enactment proceeds upon ascertained legal principles, which "those who were or ought to have been learned in the law" must be supposed to have understood," and with reference to which the act must be presumed to have been framed and passed, it cannot be said that the result is a new law, or even a departure from the language of the statute construed. It is simply giving effect to that language as understood in the light of recognized rules and presumptions relating to legislative language.]

§ 9. Application of the Principle of Literal Interpretation.— Though this rule appears so obvious, it is so frequently

(a) Lord Bacon, Essay on Judicature. *Per* Pollock, C. B., in *Rodrigues v. Melliush*, 10 Ex. 116. [*Poor v. Considine*, 6 Wall. 458.]

<sup>45</sup> *Brewer v. Blougher*, 14 Pet. 178; *Cearfoss v. State*, 42 Md. 403

<sup>44</sup> See *Dudley v. Reynolds*, 1 Kan. 285.

<sup>45</sup> Sedgwick, *Constr. of Stat. & Const.*, p. 266.

<sup>46</sup> See *Brocket v. R. R. Co.*, 14 Pa. St. 241, 243; *Com'th v. Churchill*, 2 Met. (Mass.) 118; *State v. Brooks*, 4 Conn. 446.



appealed to that it is advisable to illustrate it by some examples to show its general scope and the limits of its application. It was repeatedly decided at law (a), for instance, that the statutes of limitations which enact that actions shall not be brought after the lapse of certain periods from the time when the cause of action accrued, barred actions brought after the time so limited, though the cause of action was not discovered or, practically, discoverable by the injured party when it accrued, or was even fraudulently concealed from him by the wrong-doer, until after the time limited by the Act had expired (b). The hardship of such decisions is obvious, but the language admitted of no other construction. [Even where a survey, the making of which would have had the effect of taking the case out of a statute of limitations, was prevented by legislation, the court refused to admit an exception."'] So, if an Act provides that convictions shall be made within a certain period after the commission of the offense, a conviction made after the lapse of that period would be bad, although the prosecution had been begun within the time limited, and the case had been adjourned to a day beyond it, with the consent, or even at the instance of the defendant (c). So, when an Act

(a) Before the Judicature Act of 1873 (s. 24).

(b) *Short v. McCarthy*, 3 B. & A. 626; *Brown v. Howard*, 2 B. & B. 73; *Colvin v. Buckle*, 8 M. & W. 680; *Imperial Gas Co. v. London Gas Co.*, 10 Ex. 39; *Bonomi v. Backhouse*, E. B. & E. 622, 27 L. J. Q. B. 378, 28 L. J. 380, 34 L. J. 181, 9 H. L. 503; *Smith v. Fox*, 6 Hare, 386; *Violet v. Simpson*, 27 L. J. Q. B. 136; *Hunter v. Gibbons*, 1 H. & N. 459; *Lamb v. Walker*, 3 Q. B. D. 389. As to concealed fraud, see the cases in equity collected in *Ecclesiastical Commissioners v. N. E. R. Co.*, 4 Ch. D. 845, and since the Judicature Act of 1873, *Gibbs v. Guild*, 9 Q. B. D. 591, 51 L. J. Q. B. 313. See also *Kirk v. Todd*, 21 Ch. D. 484. ["The idea that implied and equitable exceptions, which the Legislature has not made, are to be engrafted by the courts on a statute of limitations is

now generally abandoned." *Sedgwick, Constr. of Stat., &c.*, p. 277, citing *Dozier v. Ellis*, 28 Miss. 730; *McIver v. Regan*, 2 Wheat. 25. See also *Allen v. Miller*, 17 Wend. (N. Y.) 202. But see *First Mass. Turnp. v. Fisher*, 3 Mass. 201; *Homer v. Fish*, 1 Pick. (Mass.) 435.]

<sup>41</sup> *McIver v. Regan*, 2 Wheat. 25.

(c) *R. v. Bellamy*, 1 B. & C. 500; *R. v. Tolley*, 3 East, 467; *Bellew v. Wonford*, 9 B. & C. 135; *Farrell v. Tomlinson*, 5 Bro. P. C. 438; *Adam v. The Inhabitants of Bristol*, 2 A. & E. 389; *R. v. Mainwaring*, E. B. & E. 474, 27 L. J. M. C. 278. [See *West v. Comm'r*, 2 Woodw. (Pa.) 61, where a judgment entered on March 27, 1871, in pursuance of an agreement of counsel made March 21, to take up the case on that day for argument, was reversed on certiorari, the offence having been committed

gives to persons aggrieved by an order of justices, a certain period after the making of the order, for appealing to the Quarter Sessions, it has been held that the time runs from the day on which the order was verbally pronounced, not from the day of its service on the aggrieved person (*a*). Even when the order is made behind his back, as in the case of stopping up a road, the time runs from the same date, and not from the day on which he got notice of it (*b*), notwithstanding the manifest hardship and injustice resulting from such an enactment (*c*).

§ 10. The Welsh Sunday closing Act of 1881, being fixed to come into operation on the day "next appointed" for the annual licensing meeting, was by a literal construction postponed for a year later than was, in all probability intended; but the Court refused to avert this result by any departure from the primary meaning of the words (*d*). If an Act of Parliament provides that no deed of apprenticeship shall be valid unless signed and sealed by justices of the peace, the omission of the seal would be fatal to the validity of the instrument (*e*). [So, under a statute requiring the certificate of a married woman's acknowledgment of a written instrument to be under seal, the absence of a seal renders the instrument invalid.<sup>45</sup>] The Bills of Sale Act requiring an affidavit of the due attestation as well as of the execution of the deed, the omission in the former to mention the attestation was held fatal, although the attestation clause of the deed asserted it (*f*). It would not be open to the interpreter

September 18, 1870, and the governing statute requiring the conviction to be made within six months after the commission of the offence.]

(*a*) *R. v. Derbyshire*, 7 Q. B. 193; *R. v. Huntingdonshire*, 1 L. M. & P. 78; *Exp. Johnson*, 3 B. & S. 947; *R. v. Barnett*, 1 Q. B. D. 558; comp. *R. v. Shrewsbury*, 1 E. & B. 711, 22 L. J. M. C. 98.

(*b*) *R. v. Staffordshire*, 3 East, 151.

(*c*) *Per* Lord Ellenborough, *Id.* 153.

(*d*) *Richards v. McBride*, 51 L. J. M. C. 15.

(*e*) *R. v. Stoke Damarel*, 7 B. & C. 563. See also *R. v. Mellingham*, 2 Bott. 492; *R. v. Margram*, 5 T. R. 153; *R. v. St. Peter's*, 1 B. & Ad. 916; *R. v. St. Paul's*, 10 B. & C. 12; *R. v. Staffordshire*, 23 L. J. M. C. 17.

<sup>45</sup> *McLaurin v. Wilson*, 16 S. C. 402.

(*f*) *Ford v. Kettle*, 9 Q. B. D. 139. [So, in innumerable cases, in this country, where statutes require separate acknowledgements by married women of the free execution of conveyances of their property interests, and the affixing of a certificate by the magistrate

in such cases, to shut his eyes to the formalities required, because he deemed them unimportant, or because a hardship or failure of justice might be the consequence, in the particular case before him, of a neglect of any of them.

An Act which enacted that a pilot was to deliver up his licence to the pilotage authorities "whenever required to do so," would call for implicit obedience to the letter, however arbitrarily the power which it conferred might be misused, and although the withdrawal of the license would in effect amount to a dismissal of the pilot from his employment (*a*). The Prescription Act, making all easements indefeasible which were enjoyed for a number of years "next before some suit or action wherein the claim or matter" was brought in question, was held to leave the title to every easement inchoate only, no matter how long it had been uninterruptedly enjoyed, until a suit or action was brought, when it ripened into a complete right (*b*). The Act which provided that if the occupier assessed to a rate ceased to occupy before the rate was wholly discharged, the overseers should enter his successor in the rate book, and the outgoer should not be liable for more than his due proportion, was held not to relieve him from the rest of the rate, when the premises remained unoccupied after his removal (*c*).

An enactment that a magistrate might on the application of the mother of a bastard, summon its putative father for its maintenance, within twelve months from its birth, would not authorize a second magistrate to issue a second summons after the expiration of the first twelve months, merely because the summons could not be served by reason of the defendant having absented himself, and could not be renewed or continued, because the justice who had issued it had died (*d*).

taking the acknowledgment attesting such procedure, the failure of the certificate to state any one of the requisites has been held to invalidate the instrument.]

(*a*) *Henry v. Newcastle Trinity House*, 8 E. & B. 723, 27 L. J. M. C. 57.

(*b*) 2 & 3 Wm. 4, c. 71; *Wright v. Williams*, 1 M. & W. 77. See *Ward v. Robins*, 15 M. & W. 237; and *Cooper v. Habbuck*, 12 C. B.

N. S. 456, 31 L. J. 323.

(*c*) *St. Werburgh v. Hutchinson*, 5 Ex. D. 19; 32 & 33 Vict. c. 41, s. 16. See, as other illustrations, *R. v. Mabe*, 3 A. & E. 531; *Marsden v. Savile Foundry*, 3 Ex. D. 203; *Simpkin v. Birmingham*, L. R. 7 Q. B. 482; *White v. Coquetdale*, 7 Q. B. D. 238.

(*d*) 7 & 8 Vict. c. 101; *R. v. Pickford*, 1 B. & S. 77, 30 L. J. M. C. 133.

And as the same enactment required the justices to hear the evidence of the mother at the hearing, and such other evidence as she might produce, and if her evidence was corroborated, to adjudge the man to be the putative father, it was held that no order could be made against the putative father when the mother was not examined, having died after the summons and before the hearing (a). [So, where a statute declared that the man charged by the mother of a bastard child to be its father should be the reputed father, and she persisting in said charges in the time of her extremity of labor, or afterwards in open court upon the trial of the person so charged, the same should be given in evidence in order to convict such person of fornication, it was held that her declarations during labor not corroborating any previous "charge," *i. e.* formal complaint under oath before a committing magistrate, were not sufficient to convict.<sup>49</sup>]

§ 11. Where an Act prohibits the removal of a conviction by certiorari to the Supreme Court, that writ cannot be issued (justices having jurisdiction) even for the purpose of bringing up a case stated by justices for the opinion of the Court; although the object of such a prohibition is to prevent convictions being quashed for technical defects, but not to exclude the jurisdiction of the Supreme Court, when consulted on a substantial question which the justices themselves have raised (b). An Act which imposed a penalty on any person who piloted a ship in the Thames before he was examined and admitted a Trinity House pilot was held not to reach one who had been expelled from the Society after examination and admission (c). So, where an Act gave an appeal to the next session, and directed that "no appeal should be proceeded upon" if it was found by the session that no reasonable notice had been given, but should be adjourned to the next session, the appellant was enabled to secure delay by omitting to give any notice, so that the session could not

(a) R. v. Armytage, L. R. 7. Q. B. 713.

<sup>49</sup> Comm'th v. Betz, 2 Woodw. (Pa.) 211.

(b) R. v. Chantrell, L. R. 10 Q. B. 587.

(c) Pierce v. Hopper, 1 Stra. 249.

find that "reasonable notice" had been given (*a*). In this case the construction worked an injustice and enabled a person to take advantage of his own wrong or neglect; but the language of the Legislature admitted of no other construction. Where an Act disqualified from killing game all persons not possessing land of a certain value, except the heir apparent of an esquire or other person of higher degree, it was held that esquires not possessed of the requisite property qualification were not excepted. However strange it might seem that the Legislature should refuse them the privilege which it had granted to their eldest sons (*a*), it was held to be safer to adopt what the Legislature had actually said rather than to conjecture what they had meant to say (*b*). So, under an Act which qualified for the magistracy owners in immediate remainder or reversion of lands leased for two or three lives, it was held that a remainderman expectant on the death of a tenant for life in possession was not qualified, as there was no lease. There was perhaps no good reason why the qualification should not have been extended to such a remainderman, but there was no actual absurdity, inconvenience, or injustice in the omission (*d*).

§ 12. A statute which empowered a Court of Requests to summon any person residing in a town or navigating from its port, by leaving the summons at his abode, and to proceed *ex parte* if he did not appear, was held to justify *ex parte* proceedings against a seafaring man who had for months before the summons, and during the whole of the proceeding, been absent beyond the seas (*e*). [Under an act which declared the wives of any mariners or others gone to sea to have the rights and duties of feme sole traders, it was held immaterial whether the husband had gone to sea as a mariner or a passenger.<sup>50</sup>] So, where an Act authorized justices to hear bastardy cases on proof that the summons

(*a*) 9 Geo. 1., c. 7; *R. v. Bucks*, 3 East, 342; *R. v. Staffordshire*, 7 East, 549. See *R. v. Sussex*, 4 Best & S. 966; 34 L. J. M. C. 69.

(*b*) *Jones v. Smart*, 1 T. R. 44.

(*c*) *Per Ashurst, J.*, *Id.* 51.

(*d*) 18 Geo. 2, c. 20; *Woodward*

*v. Watts*, 2 E. & B. 452, 22 L. J. 149.

(*e*) *Culverson v. Melton*, 12 A. & E. 753.

<sup>50</sup> *Jacobs v. Featherstone*, 6 Watts & Serg. (Pa.) 346

had been served at the last place of abode of the putative father, it was held that they had jurisdiction in a case where the latter was abroad, and had had no cognizance of the summons (*a*). The Carriers Act, which exempted a common carrier from liability for the loss of or injury to certain classes of goods unless the value was declared and insured, was construed literally as exempting him from liability, even when the loss was owing to his negligence (*b*). The Common Law Procedure Act of 1854, which empowered a judge to order either party to a cause to produce documents, upon the application of the other party supported by his own affidavit was held not to authorize an order on the affidavit of another person in its stead (*c*). [So, under a statute requiring the deed of a feme convert to be acknowledged by her, she cannot acknowledge by attorney in fact;<sup>51</sup> nor can the magistrate, required to take her acknowledgment, take it through a sworn interpreter.<sup>52</sup>] So, the Solicitors Act, 23 & 24 Vict. c. 127, s. 28, which authorises the imposition of a charge for cost on property recovered or preserved through the instrumentality of a solicitor, was held not to authorize such a charge, where the suit was to prevent or stop an invasion of the right to light; for this was a suit not respecting property, but respecting an easement merely, or the mode in which it was enjoyed (*b*); nor to a case where proceedings had not gone beyond a decree for an account, and the parties had then compromised without the knowledge of the solicitor of the party who thereby did recover property (*e*).

§ 13. [In obedience to the rule in question, the Supreme Court of the United States refused to modify, by a construction which would have read an act as if a succeeding

(*a*) *R. v. Damarell*, L. R. 3 Q. B. 769. See also *R. v. Davis*, 1 Bail C. C. 191, 22 L. J. M. C. 143; *R. v. Higgins*, 7 E. & B. 557, 26 L. J. M. C. 116. *Comp. R. v. Smith*, L. R. 10 Q. B. 604.

(*b*) *Hinton v. Dibben*, 2 Q. B. 646; *Morritt v. N. E. R. Co.*, 1 Q. B. D. 802.

(*c*) *Christopherson v. Lotinga*, 15 C. B. N. S. 809; *comp. Kings-*

*ford v. G. W. R. Co.*, 33 L. J. C. P., 307, 16 C. B. N. S. 761.

<sup>51</sup> *Dawson v. Shirley*, 6 Blackf. (Ind.) 531.

<sup>52</sup> *Dewey v. Campan*, 4 Mich. 565.

(*d*) *Foxon v. Gascoigne*, L. R. 9 Ch. 654.

(*e*) *Pinkerton v. Easton*, L. R. 16 Eq. 440.

section preceded the one next before it, the language of the statute, which, read in the order of its clauses, presented no ambiguity, although it resulted in what was termed by dissenting members of the Court an absurdity, viz., the giving of an intestate's estate, not to his next of kin, but to his brothers and sisters, instead of his own children.<sup>53</sup> By adopting the construction which would have read the fifth section as preceding the fourth, "instead of adjudicating," says Mr. Justice Swayne, "we should legislate. . . Our function is to execute the law, not to make it."<sup>54</sup> And following the same rule of literal construction, it was held that the phrase "and have the casting vote" gave the chairman to whom it applied a casting vote, in addition to his previous vote as a member upon the same question, *i. e.*, a double vote in case of a tie.<sup>55</sup> Again, where an act providing for the manner in which a person charged in execution might obtain his liberation from imprisonment, required that notice should be served "on the creditor or creditors, if he, she or they are within the Commonwealth," the court decided that notice must be served on all such creditors, though such construction was admittedly attended with great inconvenience where creditors were numerous.<sup>56</sup> And in the provision of a statute for the improvement of swamp lands upon a petition by owners, the phrase "the greater part of them in interest" was construed, according to its plain meaning, as referring to that portion having the greatest interest in point of value, regardless of the question of area.<sup>57</sup>

§ 14. [So, under an act which declared that all policies of life-insurance or annuities taken or to be taken out for the benefit of, or bona fide assigned to, the wife, or children, or other dependent relative, should be vested in such beneficiary free and clear from all claims of the creditors of the insured, it was held that the question of bona fides could only arise in cases of assignments, and that the title of the

<sup>53</sup> *Poor v. Considine*, 6 Wall. 458.

<sup>54</sup> *Ibid.* Compare, on the subject of transposition of clauses, *State v. Turnp. Co.*, 16 Ohio St. 308; and see post, § 318.

<sup>55</sup> *People v. Church*, 48 Barb. (N. Y.) 603.

<sup>56</sup> *Putnam v. Longley*, 11 Pick. (Mass.) 487.

<sup>57</sup> *Henry v. Thomas*, 119 Mass. 583.

beneficiary, when existing by force of original issue in the name or for the benefit of such beneficiary must be deemed irrespective of any question of good faith." A provision in a statute that "all laws and parts of laws now in force, relative to the sale of vinous or spirituous, malt or brewed liquors, or any admixture thereof, in the county of A., or any part thereof, be and the same are hereby repealed," repealed as to the county of A. all general and special laws respecting such sale in force in said county, except those for which the act itself provided; it repealed, *e. g.*, the general law prohibiting the sale of intoxicating liquors on Sunday." An act authorizing the transfer of judgments generally from one county to another for the purpose of lien, permitted the transfer of a judgment, for that purpose, which had been opened by the court of the county, in which it was originally entered, and as to which an issue had been awarded by said court, and defendant let into a defence.<sup>60</sup> An act providing that "any borrower" might contract for the payment, in addition to interest, of "any and all sums assessed or to be assessed for taxes upon the loan or its interest," applies as well to municipal corporations as to other corporations and individuals.<sup>61</sup> Under an act abolishing imprisonment for debt, a judgment or decree for the payment of costs incident to a suit founded upon contract, and not involving a breach of trust, *e. g.*, the payment of master's fees in an equity proceeding, was held unenforceable by attachment against the person of the defendant.<sup>62</sup> An act authorizing the filing of mechanics' liens in certain cases, against leased estates, applies whether the lease be oral or written.<sup>63</sup> Under an act providing that real estate sold by the sheriff shall be held and enjoyed by the purchaser, his heirs and assigns, as fully and amply, and for such estate or estates as the defendant had therein, the omission of words

<sup>60</sup> McCutcheon's App., 99 Pa. St. 133.

<sup>61</sup> Com'th v. Gedikoh, 101 Pa. St. 354.

<sup>62</sup> Kittanning Ins. Co. v. Scott, 101 Pa. St. 449; though, of course, no execution could be issued on the transcript, during the pendency

of the proceedings on the original judgment: Ibid.

<sup>63</sup> Fidelity, &c. Co., v. Scranton, 102 Pa. St. 387.

<sup>64</sup> Pierce's App., 103 Pa. St. 27. Comp. post, § 74, Wood v. Wood, Phill. L. (N. C.) 538.

<sup>65</sup> Mountain City, &c. Ass'n. v. Kearns, 103 Pa. St. 403.



of inheritance in the sheriff's deed does not limit the estate conveyed to the purchaser."<sup>64</sup> An act authorizing a corporation to assess upon each share of stock such sums of money as the stockholders think proper, not exceeding, in the whole, the original par value of the stock, confers the power to make such assessments upon stock the full par value of which has been already paid by the subscriber."<sup>65</sup> Under an act giving a reward to "whosoever shall pursue and apprehend any person who shall have stolen any mare," etc., the owner of such animal, who pursues and apprehends the thief that stole it, is entitled to the reward."<sup>66</sup> Upon the same principle of construction an act making the property of the county of B. in the township of C. liable to road-taxes in said township, did not subject to such taxation the real estate owned in said township by the "Directors of the Poor, etc., of the county of B.," a corporation created by statute for purposes relating to the poor of said county. "It certainly does not matter that the money used for the purchase of the land and the erection of the buildings was raised by assessments made by the County Commissioners, for the money thus raised was intended for the use of the poor district, and the municipality known as B. County had no interest in or control over it or the property it was used to purchase."<sup>67</sup>

§ 15. [So, again, power given by statute to purchase "any property," gives power to purchase real and personal property."<sup>68</sup> And an act disposing of state property, excepting that portion "known as the government reservation," excepted all lands known by that name, whether the reservation had any legal existence or not."<sup>69</sup> In another case, the court refused to read "no" for "an" in the absence of positive proof of error furnished by the original enrolled bill."<sup>70</sup> Under a statute providing that "an action may be brought by any person in possession. . . against any person who

<sup>64</sup> *Middleton v. Middleton*, 106 Pa. St. 252.

<sup>65</sup> *Price's App.*, 106 Pa. St. 421. See to similar effect, as to liability of stockholders under Wis. R. S. § 1769. *Sleeper v. Goodwin*, 67 Wis. 577.

<sup>66</sup> *Butler Co. v. Leibold*, 107 Pa. St. 407.

<sup>67</sup> *Cumru Township v. Poor Directors*, 112 Pa. St. 264.

<sup>68</sup> *DeWitt v. San Francisco*, 2 Cal. 289.

<sup>69</sup> *People v. Dana*, 22 Cal. 11; *Blane v. Bowman*, *Id.* 23.

<sup>70</sup> *Angele de Sentmanat v. Soula*, 33 La. An. 609.

claims an estate . . . therein . . . adverse to him, for the purpose of determining such adverse claim," etc., it was held that any interest claimed adversely to the plaintiff might be determined, whether claimed from the same source from which the plaintiff claimed, or from a different one." Where a statute prescribes as the punishment for an offense, fine and imprisonment, the court is bound to inflict both upon the party convicted."<sup>72</sup>]

§ 16. [Again, where an act directed that "the unpaid balance" "of \$664,300" on the sale of certain railroads, "together with all interest that might accrue thereon," be appropriated to building a branch road between certain termini, and the unpaid balance upon the sale referred to was, in point of fact, \$674,300, it was held, that, the language being plain and unequivocal, it could not be controlled by any presumed intention to appropriate the whole balance, and that, therefore, a mandamus would not lie against the State to enforce the payment of the difference of \$10,000 between the actual balance and the sum named as such in the Act.<sup>73</sup> So, under an Act providing that a demand exhibited within two years might be proved within three years, although it was clear that three was substituted for two by mistake, the court refused to construe away the plain meaning of the language as it stood." So, again, where it was evident that, in copying from an earlier act, the words "other than the county," before the word "from," had been omitted in the requirement of fifteen days' notice of "a motion to amerce the sheriff of any county from which the execution is issued," the court declined to depart from the obvious meaning of the language used, by interpolating the omitted words."<sup>74</sup> An act entitling widows and orphans of testators and intestates to a reasonable support and maintenance out of their estates, for a period of twelve months immediately after the death of such, was held to apply equally whether the estates thus drawn upon were solvent

<sup>72</sup> Walton v. Perkins, 33 Minn. 357.

<sup>73</sup> U. S. v. Vickery, 1 Har. & J. (Md.) 427. S. P., Com'th v. Shade, 1 Woodw. (Pa.) 44.

<sup>74</sup> St. Louis, etc. R. R. Co. v.

Clark, 53 Mo. 214.

<sup>74</sup> Hicks v. Jamison, 10 Mo. App. 35. And see Pacific v. Seifert, 79 Mo. 310.

<sup>75</sup> Woodbury v. Berry, 18 Ohio St. 456.

or insolvent."<sup>76</sup> An act forbidding the carrying of concealed deadly weapons is violated by the carrying of a pistol concealed but for a moment."<sup>77</sup>

§ 17. **Exceptions.**—It is but a corollary to the general rule in question, that nothing is to be added to or to be taken from a statute, unless there are similar adequate grounds to justify the inference that the Legislature intended something which it omitted to express (a). [Unless upon such grounds, courts are not at liberty to engraft exceptions or limitations upon words of general scope and comprehensiveness."<sup>78</sup> Where a statute makes no exceptions, the courts can make none."<sup>79</sup> Thus, where an act prohibited absolutely the sale of liquor, the court refused to recognize an exception in the case of liquor shown to have been sold and used as medicine."<sup>80</sup> So, an act making the probate of wills devising real estate conclusive as to such realty unless appealed from within five years, operates against all persons, whether under disabilities or not."<sup>81</sup> And a statutory limitation to five years of the lien of a decedent's debts upon his realty, excepting the cases of mortgages and judgments, and where an action for recovery is brought, is subject to no other exceptions, and to no distinction as to the character of the debt or demand; so that a debt due by a guardian, at his death, to his ward, though, as a trust, beyond the reach of the general limitation laws, can be a lien on his real estate, except in the cases provided for by

<sup>76</sup> *Hopkins v. Long*, 9 Ga. 261.

<sup>77</sup> *Brinson v. State*, 75 Ga. 882.

(a) See *per Tindal, C. J.*, in *Everett v. Wells*, 2 M. & Gr. 277; *per Lord Westbury* in *Exp. St. Sepulchre*, 33 L. J. Ch. 375; *Re Cherry's Estate*, 31 L. J. Ch. 351. See, however, *Re Wainright*, *Williams v. Evans*, and other cases mentioned *infra*, §§ 295, et seq.

<sup>78</sup> *U. S. v. Coombs*, 12 Pet. 72; *Tyman v. Walker*, 35 Cal. 634; *Jones v. Jones*, 18 Me. 308; *Harrington v. Smith*, 28 Wis. 43; *Torrance v. McDougald*, 12 Ga. 526.

<sup>79</sup> *Kirpatrick v. Byrne*, 25 Miss. 57. "It is always unsafe to depart from the plain and literal meaning of the words contained in legislative enactments out of deference to

some supposed intent, or absence of intent, which would prevent the application of the words actually used to a given subject." *Pittsburgh v. Kalchthaler*, 114 Pa. St. 547, 552.

<sup>80</sup> *Com'th v. Kimball*, 24 Pick. (Mass.) 370. But see *Thomasson v. State*, 15 Ind. 449, where, by construction, exceptions were made as to liquor sold for medicinal or sacramental purposes.

<sup>81</sup> *Cochran v. Young*, 104 Pa. St. 333; and see *Warfield v. Fox*, 53 Id. 382; *Hunt v. Wall*, 75 Id. 413; and see *McGaughey v. Brown*, 46 Ark. 25, 37, as to coverture, citing *Pryor v. Ryburn*, 16 Id. 671; *Gwynn v. McCauley*, 32 Id. 97; *Morgan v. Hamlet*, 113 U. S. 449.

the act, for only five years after the guardian's death.<sup>82</sup> So, where an act authorized the courts of common pleas to change the name, style and title of any corporation within their respective jurisdictions, "provided, that no proceeding for such purpose shall be entertained by the courts until notice of such application is given to the Auditor General, and proof of such fact is produced to the courts," it was held that this requisition applied to all corporations whether of the class whose charters were to be filed in the Auditor General's office, or not.<sup>83</sup> And so, again, under a statute declaring that "all property . . . from which any income or revenue is derived shall be subject to taxation," it was held that water-works from which a revenue was derived, though the works were owned by a municipality, and irrespectively of the question whether the revenues were paid into the treasury of the municipality or used in maintaining and improving the property, were subject to county-tax.<sup>84</sup> Upon the same principle an act permitting any wife to file a libel in divorce, includes a wife who is under age;<sup>85</sup> and an act authorizing the foreclosure of mortgages by advertisement and sale under power contained in them, admits of no exception in favor of an insane mortgagor.<sup>86</sup>

§ 18. **Additions.**—A case which has been omitted is not to be supplied merely because there seems no good reason why it should have been omitted, and the omission appears consequently to have been unintentional. Thus, the Divorce Act, which provided that any order made for the protection of the earnings of a deserted married woman might be discharged by the magistrate who made it, was held not to empower his successor to discharge it, though the magistrate who had made it was dead (*a*). [So, where an act had conferred upon an officer the right to receive the proof or acknowledgment of all instruments in writing conveying

<sup>82</sup> *Oliver's App.*, 101 Pa. 299.

<sup>83</sup> *Re First Presb. Church*, 107 Pa. St. 543.

<sup>84</sup> *Erie Co. v. Com'rs of Water Works*, 113 Pa. St. 368.

<sup>85</sup> *Jones v. Jones*, 18 Me. 308.

<sup>86</sup> *Encking v. Simmons*, 28 Wis. 272.

(*a*) 21 & 22 Vict. c. 85; *Exp.*

*Sharp*, 5 B. & S. 322; 33 L. J. M. C. 152; see now 27 & 28 Vict. c. 45. See also *Nettleton v. Burrell*, 8 Scott, N. R. 738; *Wanklyn v. Woollett*, 4 C. B. 86; *R. v. Ashburton*, 8 Q. B. 871; *Higgs v. Schroeder*, 3 C. P. D. 252; *Newton v. Boodle*, 3 C. B. 795; *Hind v. Arthur*, 7 D. & L. 252.

land within the county in which he had jurisdiction, and a later statute enlarged his authority to take acknowledgments of deeds for lands in any part of the state, it was held that, his power to receive proof of deeds remained restricted to deeds conveying land in his own county.<sup>87</sup> Similarly, an act providing for testing the accuracy of the weights and measures used in selling commodities, and punishing the selling by unmarked weights and measures, was of necessity held inapplicable to buyers' scales and measures.<sup>88</sup> In both of these cases, it was admitted that there was no apparent reason for the discrimination. But the language of the enactments was free from ambiguity and uncertainty, and in such cases, courts cannot supply defects in the enactment in order to carry out more fully the supposed purpose and intent of the Legislature.<sup>89</sup> "It is not for courts of justice, *proprio marte*, to provide for all the defects or mischiefs of imperfect legislation."<sup>90</sup> If an Act requires that a writ, on renewal, shall be sealed with a seal denoting the date of renewal, a copy of the writ cannot be substituted for the original for this purpose, when the original is lost (*a*). [So, where an act requires, in order to entitle plaintiff to judgment for want of an affidavit of defense, that he file a copy of the instrument or book entries upon which his suit is based, nothing short of an actual copy will suffice, and a reproduction of a lost bond or book entry cannot be filed with the effect of entitling plaintiff to such judgment." ] So, also, it was held that the 26 & 27 Vict. c. 29, which enacts that answers made to an election commission shall not be admitted in evidence in any proceeding except in cases of

<sup>87</sup> *Peters v. Condron*, 2 Serg. & R. (Pa.) 80.

<sup>88</sup> *Southw. R. R. Co. v. Cohen*, 49 Ga. 627.

<sup>89</sup> *Swift v. Luce*, 27 Me. 285.

<sup>90</sup> *STORY, J.*, in *Smith v. Rues*, 2 Sumn. 354, 355.

(*a*) 15 & 16 Vict. c. 76, and Ord. 8, Judic. Act; *Davis v. Garland*, 1 Q. B. 250; and see *Nazer v. Wade*, 1 B. & S. 728, 31 L. J. Q. B. 5; *Evans v. Jones*, Id. 61; *Freeman v. Tranch*, 12 C. B. 406, 21 L. J. 214. [But under an act which

made it the duty of the recorder of deeds to "certify the recognizance" of certain officers to the prothonotary of the court of common pleas, for the purpose of fixing a lien on the lands of the sureties, etc., a certification of a certified copy, instead of the original, was held a compliance with the act: *Borlin v. Highberger*, 104 Pa. St. 143.]

<sup>91</sup> *Com'th v. Laws*, 7 W. N. C. (Pa.) 80; *Stoops v. Post*, 15 Id. 176.

“indictment” for perjury, left them excluded in “informations” for perjury filed by the Attorney-general (a).

§ 19. When the Common Law Procedure Act of 1852 abolished the writ of distringas without providing for the service of a writ on lunatics in confinement and inaccessible, it was found that no actions could be prosecuted against them (b). So, when extra-parochial places were made rateable without either repealing the enactments which required that a copy should be affixed on or near the doors of all the churches in the parish, or making any other provision for publication, it was held, where there was no church in the extra-parochial place, that a rate affixed on a church door fifty yards from the boundary was not valid for want of publication (c). The 4 & 5 W. & M. c. 20, which required that judgments should be docketted, enacted that undocketted judgments should not affect lands as regarded purchasers or mortgagees, or have preference against heirs or executors. The 2 & 3 Vict. c. 11, abolished docketting, and enacted that no judgment should have effect unless registered; but it made no provision for the protection of heirs and executors. Though this was perhaps an oversight, resulting in hardship on an executor who had paid simple contract debts without keeping sufficient assets to meet an unregistered judgment of which he had no notice, the court refused to supply the omission (d). These were all *casus omissi* which the court could not reach by any recognized canons of interpretation. [For, whilst, where a case not expressly provided for by a statute is yet so clearly within its reason as to warrant the inference that the Legislature, having the case in contemplation, deemed it unnecessary expressly to enumerate it, the court may extend the words of the statute to such case, although, in their primary sense, they may not include it; yet if there is nothing in the context to give them a broader meaning,—if the omission was because the contingency was unforeseen, and therefore not

(a) *R. v. Slator*, 8 Q. B. D. 267.

(b) *Holmes v. Service*, 15 C. B. 293, 28 L. J. 24; *Williamson v. Maggs*, 28 L. J. Ex. 5. See *Judic. Act, 1875, Ord. 9 (5)*.

(c) *R. v. Dyott*, 9 Q. B. D. 47, 51 L. J. 104; 17 Geo. 2, c. 3, and 1 Vict. c. 45.

(d) *Fuller v. Redman*, 26 Beav. 600, 29 L. J. 324.

within the contemplation of the Legislature, the court would be assuming legislative powers, if it were to supply the defect."']

§ 20. Where an Act authorized the apportionment of the cost of making a sewer, without limiting any time for the purpose, the court refused to read the Act as limiting the exercise of the power to a reasonable time (*a*). The 21 Jac. 1, having provided that the Statute of Limitations should not run while the plaintiff was beyond the seas, and the 4 & 5 Anne having made a similar provision where the defendant was abroad, the 3 & 4 W. 4, c. 42, enacted that no part of the United Kingdom should be deemed beyond the seas within the meaning of the former Act, but made no mention of the latter; and it was held that it could not be stretched to include it (*b*). There may have been no good reason for thus limiting the new enactment to the Act of James; but there was no sufficient ground either in the context or in the nature of the consequences resulting from the omission, for concluding that the Act of Anne was intended to be included. So when the Married Women's Property Act of 1870 empowered a married woman to sue, without making her liable to be sued, it was held that no action lay against her (*c*). The Habitual Criminals' Act, in enacting that upon a trial for receiving stolen goods, a previous conviction for any offense involving dishonesty should be admissible against the prisoner as evidence of his having received with guilty knowledge, provided that notice were given to him that the conviction would be put in evidence "and that he would be deemed to have known that the goods were stolen until he proved the contrary,"

<sup>22</sup> See *Hull v. Hull*, 2 Strobb. Eq. (S. C.) 174. But see *Maxwell v. State*, 40 Md. 273, 292, 298, as to power of court to assume and supply an omission in a long and complicated act.

(*a*) *Bradley v. Greenwich Board*, 3 Q. B. D. 384. [So it is said in *Martin v. Robinson*, 67 Tex. 368, that, where an act does not fix a time after which administration shall not be opened, the courts cannot legislate by fixing an arbitrary time. *Comp. Ricard v. Williams*,

7 Wheat. 115; *McFarland v. Stone*, 17 Vt. 173, and see post, § 327. See *Burden v. Stein*, 25 Ala. 455, that when a statute requires notice to be given and specifies no particular length of time, it is construed to mean a reasonable time.]

(*b*) *Lane v. Bennett*, 2 C. M. & R. 70; *Battersby v. Kirk*, 2 Bing. N. C. 584.

(*c*) 33 & 34 Vict. c. 93, s. 11; *Hancock v. Lablache*, 3 C. P. D. 197.

omitted, however, to enact substantively that this effect should be given to the conviction; and it was held that the omission could not be supplied (*a*). Without such an emendation, the notice was incorrect and misleading; but it did not lead to any injustice or inconvenience or other mischievous consequence. So, although the Bills of Sale Act of 1878 required that the execution of every bill of sale should be attested by a solicitor, and that "the attestation should state" that the instrument was explained by the solicitor to the grantor before execution, it was held that no explanation was required; for the Act did not expressly enact that an explanation should be given; it required only that the attestation should assert that it had been given (*b*). [So, where an act required certain wills to be executed in the "presence" of two witnesses, it was held that they need not attest the execution of the instrument by subscribing the same as witnesses, the law merely requiring their presence.<sup>93</sup>]

§ 21. Where a railway Act provided that the company, while in possession, under the Act, of lands liable to assessment to parochial rates, should, until its works were completed and liable to assessment, be bound to make good the deficiency in the parochial assessment by reason of the land having been taken, it was held, at first, that the company was bound to make good the deficiency in any one of the parishes through which the line ran, only until the line was completed within the parish (*c*); but this construction was rejected by the Queen's Bench and by the Exchequer Chamber, partly on the ground that in effect it introduced the words "in the parish" into the Act; and it was held that the company continued liable to make good the defi-

(*a*) *R. v. Davis*, 1 C. C. R. 272, 39 L. J. 135.

(*b*) Repealed by 45 & 46 Vict. c. 48, s. 10; *Exp. National Merc. Bank*, 15 Ch. D. 43. See also *Exp. Bolland*, 21 Ch. D. 543.

<sup>93</sup> *Combs' App.*, 105 Pa. St. 155.

A "disinterested" witness is there said to be one who has no legal

interest; a "credible" one, one who is not disqualified to testify. An employe of a charitable institution, a legatee under a will, was, therefore, held to be a disinterested and credible witness to the execution of the will.

(*c*) *Whitechurch v. East London Co.* L. R. 7 Ex. 248.



ciency in every parish until the whole line was completed from end to end (a).

§ 22. [It has been seen<sup>94</sup> that the plain meaning of the language used in a statute will not be departed from in its construction, though the purpose of the enactment be defeated by following it. Upon the same principle, courts cannot supply legislative defects and omissions, although, by reason of such, the statute becomes, in whole or in part, practically unenforceable or inoperative. So, an act which authorized municipalities, according to a procedure therein described, to open and widen streets, and prescribed a procedure for the opening, but none for the widening of the same, was held to that extent inoperative.<sup>95</sup>]

§ 23. **Effect to be given to Every Word, etc.**—A construction which would leave without effect any part of the language, would be rejected, unless justified on similar grounds (b). [And the fact that a given construction would make a word redundant is some reason for its rejection;<sup>96</sup> for, it being presumed, wherever such a presumption can be sustained, that the Legislature meant precisely what it said,<sup>97</sup> no word in it is to be treated as unmeaning, if a construction can be legitimately found which will preserve it and make it effectual.<sup>98</sup> And the same rule forbids the rejection, as meaningless or superfluous of any sentence or clause of a statute.<sup>99</sup>] Thus, where an Act plainly gave an appeal from

(a) *R. v. Metrop. Distr. R. Co.*, L. R. 6 Q. B. 698; *Whitechurch v. East London R. Co.*, L. R. 7 Ex. 248; reversed, however, 7 H. L. 89.

<sup>94</sup> See ante, § 6.

<sup>95</sup> *Chaffee's App.*, 56 Mich. 244. And see *Pillow v. Gaines*, 3 Lea (Tenn.) 466.

(b) See infra, §§ 295 et seq.

<sup>96</sup> *Dearborn v. Brooklyn*, 97 Mass. 466; *Gates v. Salmon*, 35 Cal. 576; *Parkinson v. State*, 14 Md. 184.

<sup>97</sup> *Montclair v. Ramsdale*, 107 U. S. 147.

<sup>98</sup> *Dibblee & Co's Case*, 3 Ben. 283; *Davis' Case*, Id. 482; *U. S. v. Warner*, 4 McLean, 463; *Com'th v. Alger*, 7 Cush. (Mass.) 53, 89; *Op. of Justices*, 22 Pick. (Mass.) 571;

*Leversee v. Reynolds*, 13 Iowa, 310; *Brooks v. Mobile Sch. Com'rs*, 31 Ala. 227; *Williams v. People*, 17 Ill. App. 274; *James v. Dubois*, 16 N. J. L. 285; *Murray v. Keyes*, 35 Pa. St. 384; *Com'th v. Shopp*, 1 Woodw. (Pa.) 123; *San Francisco v. Hazen*, 5 Cal. 169; *People v. King*, 28 Id. 265; *Atty. Gen. v. Plank Road Co.*, 2 Mich. 138; *People v. Burns*, 5 Id. 114; *Rawson v. State*, 19 Conn. 292; *Hartford Bridge Co. v. Union Ferry*, 29 Id. 210; *Hutchin v. Niblo*, 4 Blackf. (Ind.) 148; *Hagenbuck v. Reed*, 3 Neb. 17; *State v. Babcock*, 21 Id. 599; *Torreyson v. Examiners*, 7 Nev. 19; *Lacey v. Moore*, 6 Coldw. (Tenn.) 348; *Aldridge v. Mardoff*, 32 Tex. 204.

<sup>99</sup> See *Hagenbuck v. Reed*, 3

one Quarter Sessions to another, it was observed that such a provision, though extraordinary and perhaps an oversight, could not be eliminated (a). The 32 & 33 Vict. c. 51, which gives to certain County Courts power to try claims under £300, arising out of "any agreement in relation to the use or hire of a ship," or in relation to the carriage of goods, with an appeal to the Court of Admiralty, and power to the latter Court to transfer any such causes to itself, was at first held not to give the County Court jurisdiction over suits for the breach of a charter-party notwithstanding the comprehensive nature of the language used; on the ground that the literal construction would involve the presumed unintended anomalies of giving by mere implication a large, novel, and inconvenient jurisdiction to the Court of Admiralty, and to the suitor the remedy of proceeding *in rem* when his claim was under £300, which he did not possess when it exceeded it (b). But this construction did not prevail, because it left without effect the words which gave jurisdiction over any agreement in relation to the use or hire of a ship (c); and yet it was difficult to believe that the resulting consequences were within the contemplation of the Legislature or the scope of the enactment. [A fortiori, is this construction imperative when it results in nothing unreasonable. Thus the literal construction of an act which submitted the question of the organization of a new county to the vote of the electors of the three counties from which the new one was to be taken, "at township meetings to be held in said county," required the submission of the question to the electors of the three counties residing in the territory which was to compose the new county.<sup>100</sup>]

§ 24. **Insensible Enactments.**—Where the language is precise and unambiguous, but at the same time incapable of reasonable meaning, and the Act is consequently inoperative; a Court is not at liberty to give the words, on merely con-  
 jec-

Neb. 17; Murray v. Keyes, 35 Pa. St. 384.

(a) R. v. West Riding, 1 Q. B. 329.

(b) Simpson v. Blues, L. R. 7 C. P. 290; Gunnestad v. Price, L. R.

10 Ex. 65.

(c) Gaudet v. Brown, L. R. 5 P. C. 134; The Alina, 5 P. D. 138, 49 L. J. 40.

<sup>100</sup> People v. Burns, 5 Mich. 114.

tural grounds (a), a meaning which does not belong to them. [In other words, where the language of a statute is so devoid of certainty as to render it impossible to ascertain the result intended to be achieved, it cannot be assumed that it was intended to give the court, as the interpreter of the statute in the last resort, a power to control the event.<sup>101</sup>] Thus, where an Act made warrants of attorney to confess judgment void as against the assignees of a bankrupt, if not filed within twenty-one days from execution, or unless judgment was signed "or" execution was "issued" within the same period; the Court of Queen's Bench refused to alter "or" into "and," and "issued" into "levied;" though the passage was unmeaning as it stood, and the proposed alterations would have given it an effect which, because rational, was probably, but only conjecturally, the effect intended by the Legislature (b). [So, where an act prohibited the sale of liquor "within three miles of Mt. Zion Church, in Gaston County," and there were two churches of that name, several miles apart, in said county, it was held that the statute must remain inoperative.<sup>102</sup> The same disposition was made of an act which directed that appeals from interlocutory judgments, etc., be regulated by the law regulating appeals from final judgments, so far as the same might be applicable thereto, it being apparent that the law governing appeals from final judgments was incapable of application to appeals from interlocutory determinations.<sup>103</sup> Similarly, an ordinance prohibiting the driving of any "drove or droves" of cattle through the streets of a city, was held incapable of construction and hence inoperative, because of the vagueness of the word "drove" in respect of the quantity of cattle intended.<sup>104</sup> As a matter of course, the principle forbidding courts to guess at the meaning of an act which expresses none, is peculiarly applicable to statutes disposing over life and death.<sup>105</sup>]

(a) But see *infra*, §§ 295 et seq.

<sup>101</sup> *Com'th v. Bank*, 3 Watts & Serg. (Pa.) 173, 177.

(b) *Green v. Wood*, 7 Q. B. 178; see also *Doe v. Carew*, 2 Q. B. 317; and *Mundy v. Rutland*, Q. B. Nov. 29, 1882. *Comp. Doe v. Moffatt*, 15 Q. B. 257.

<sup>102</sup> *State v. Partlow*, 91 N. C. 550.

<sup>103</sup> *Ward v. Ward*, 37 Tex. 389. And see *Hughes' Case*, 1 Bland (Md.) 46.

<sup>104</sup> *McConvill v. Jersey City*, 39 N. J. L. 38.

<sup>105</sup> See *State v. Boon*, 1 Tayl. (N. C.) 246.

## CHAPTER II.

EXTERNAL CIRCUMSTANCES, CONTEXT, AND ACTS IN *PARI MATERIA*.

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§ 25. *Inadequacy of Literal Interpretation.*—The foregoing elementary rule of construction does not carry the interpreter far; for it is confined to cases where the language is precise and capable of but one construction, or where neither the

context nor the consequences to which the literal interpretation would lead, show that that interpretation does not express the real intention.

But it is another elementary rule, that a thing which is within the letter of a statute is not within the statute unless it be also within the meaning of the Legislature (*a*), and the words, if sufficiently flexible, must be construed in the sense which, if less correct grammatically, is more in harmony with that meaning (*b*). Language is rarely so free from ambiguity as to be incapable of being used in more than one sense; and to adhere rigidly to its literal and primary meaning in all cases would be to miss its real meaning in many. If a literal meaning had been given to the laws which forbade a layman to lay hands on a priest, and punished all who drew blood in the street, the layman who wounded a priest with a weapon would not have fallen within the prohibition, and the surgeon who bled a person in the street to save his life, would have been liable to punishment (*c*). On a literal construction of his promise, Mahomed II.'s sawing the Venetian governor's body in two, was no breach of his engagement to spare his head; nor Tamerlane's burying alive a garrison, a violation of his pledge to shed no blood (*d*). On a literal construction, Paches, after inducing the defender of Notium to a parley under a promise to replace him safely in the citadel, claimed to be within his engagement when he detained his foe until the place was captured, and put him to death after having conducted him back to it (*e*); and the Earl of Argyll fulfilled in the same spirit his promise to the laird of Glenstane, that if he would surrender he would see

(*a*) Bac. Abr. Statute (I.), 5. [People v. Ins. Co., 15 Johns. (N. Y.) 358; Freethy v. Freethy, 42 Barb. (N. Y.) 641; Jersey Co. v. Davison, 29 N. J. L. 415; Morrison v. McNeil, 6 Jones L. (N. C.) 450.]

(*b*) See *per* Cur. in Hollingworth v. Palmer, 4 Ex. 281; Waugh v. Middleton, 8 Ex. 352, 22 L. J. Ex. 111, *per* Pollock, C. B.; Caledonian R. Co. v. N. Brit. R. Co., L. R. 6 App. 122, *per* Lord Selborne; *per* Lord Blackburn, in Edinburgh Tramways Co. v. Torbain, 3 App.

68; River Wear Com. v. Adamson, 2 App. 743, and Direct U. S. Cable Co. v. Anglo-American Telegraph Co., Id. 412; *per* Jessel, M. R. in Exp. Walton, 17 Ch. D. 746. [See People v. Ins. Co., 15 Johns. (N. Y.) 358; Tonnele v. Hall, 4 N. Y. (4 Comst.) 140; Big Black Creek, etc., Co., v. Com'th, 94 Pa. St. 450; and also, post, §§ 295, seq.]

(*c*) 1 Bl. Comm. 60.

(*d*) Vattel, L. N. b. 2, §. 273.

(*e*) Thucyd. 3, 34; Grote's Greece, vol. 6, c. 50

him safe to England; for he hanged him only after having taken him across the Tweed to the English bank (*a*).

§ 26. The equivocation or ambiguity of words and phrases, and especially such as are general, is said by Lord Bacon to be the great sophism of sophisms (*b*). They have frequently more than one equally obvious and popular meaning; words used in reference to one subject or set of circumstances may convey a meaning quite different from what the same words used in reference to another set of circumstances and another object would convey. Many admit of indefinite extension or restriction, according to the subject to which they relate, and the scope and object in contemplation. They may convey faithfully enough all that was intended, and yet comprise also much that was not; or, be so restricted in meaning as not to reach all the cases which fall within the real intention. Even, therefore, where there is no indistinctness or conflict of thought, or carelessness of expression in a statute, there is enough in the natural vagueness and elasticity of language to account for the difficulty so frequently found in ascertaining the meaning of an enactment, with the degree of accuracy necessary for determining whether a particular case falls within it. But statutes are not always drawn by skilled hands, and they are always exposed to the risk of alterations by many hands which introduce different styles and consequent difficulties of interpretation. Nothing, it has been said by a great authority (*c*), is so difficult as to construct properly an Act of Parliament; and nothing so easy as to pull it to pieces.<sup>1</sup>

(*a*) Burton's Sc. Crim. Tr. 17. See other instances of such frauds collected in Grot. de jure b., b. 2, c. 16, s. 5.

(*b*) Lord Bacon, Adv. of Learning, b. 2.

(*c*) *Per* Lord St. Leonards in O'Flaherty v. McDowell, 6 H. L. 179; and see also *per* Bramwell, L. J., in 2 Q. B. D. 552, 2 C. P. D. 496, 4 Q. B. D. 115.

<sup>1</sup> The doubts and difficulties which chiefly tend to create uncertainty in the statute law are (see Wilberforce, Stat. L. pp. 2-8), said to be (1) the imperfection of

all human language, there being "no word in the English language which does not admit of various interpretations" (cit. Pollock, C. B., in R. v. Skeen, Bell's Cr. Cas. at p. 134), some having lost the definite meaning they had when first received into our language, some retaining their primary sense when used by purists, and some again, having acquired from the art or trade in which they are used, a meaning entirely different from their popular acceptation; (2) the language and style adopted by the framers of statutes,—a "much

§ 27. **Lord Coke's Rule.**—The literal construction then, has in general, but a *prima facie* preference. To arrive at the real meaning, it is always necessary to take a broad general view of the Act, so as to get an exact conception of its aim, scope and object. It is necessary, according to Lord Coke (*a*), to consider, 1. What was the law before the Act was passed; 2. What was the mischief or defect for which the law had not provided; 3. What remedy the Legislature has appointed; and 4. The reason of the remedy.<sup>2</sup> According to another authority, the true meaning is to be found, not merely from the words of the Act, but from the cause and necessity of its being made, from a comparison of its sev-

more fruitful source of trouble"—the framers, however clearly conscious of the thoughts they wish to express, seldom choosing apt words to convey their meaning, and "ill-penned" enactments, "putting judges in the embarrassing situation of being bound to make sense out of nonsense, and to reconcile what is irreconcilable" (Lord Campbell, in *Fell v. Burchett*, 7 E. & B. at p. 539; and see the observation of Mr. Justice Story, *U. S. v. Bassett*, 2 Story, 389, 404: "I believe that there are very few acts of legislation in the Statute Book, either of the State, or of the National Government, or of the British Parliament, which do not fall within the same predicament, and are not open to the same objection; or, if you please, to the same reproach. The truth is, that it arises sometimes from loose and inaccurate habits of composition of the draftsman; sometimes from hasty and unrevised legislation; but more frequently from abundant and perhaps, over-anxious caution,") and being often the result of difficulties, not only in the way of accurate expression, but besetting the path of the legislative draftsman, who in order to draw a bill that will pass, must often avoid a clear expression of the object and intention in his own mind, which would provoke an opposition he may hope to lull to sleep by studied ambiguity; (3)

as applicable to statute law, as distinguished from statutes, (see ante, § 1, note 1), and being the result to some extent of the two foregoing elements, the varieties of judicial interpretation.

(*a*) *Heydon's Case*, 3 Rep. 76; 10 Rep. 73a. [The points as stated by Lord Coke in this case, are as follows:—"1. What was the common law before the making of the act?—2. What was the mischief and defect for which the common law did not provide?—3. What remedy the Parliament hath resolved and appointed to cure the disease of the commonwealth?—4. The true reason of the remedy." The modification introduced in the text by omitting the word "common" seems judicious. The rule has been applied to the construction of statutes upon matters previously regulated by statute, quite as universally as to those which prescribe a statutory, in the place of, or in addition to a previous common law rule. It applies with particular force to the construction of statutes amendatory of other statutes: *Maus v. Logansport*, &c. R. R. Co., 27 Ill. 77; *People v. Greer*, 43 Id. 213.]

<sup>2</sup> See *Woods v. Maine*, 1 Gr. (Ia.) 275; *Cumberland Co. v. Boyd*, 113 Pa. St. 52; *Sibley v. Smith*, 2 Mich. 486; *Winslow v. Kimball*, 25 Me. 493; *Berry v. Clary*, 77 Me. 482; *Alexander v. Worthington*, 5 Md. 471.

eral parts and from extraneous circumstances (a); [or by an examination of, and comparison of the doubtful words with, the context of the law, considering its reason and spirit, and the inducing cause of its enactment.\*] The true meaning of any passage is to be found not merely in the words of that passage, but in comparing it with every other part of the law, ascertaining also what were the circumstances with reference to which the words were used, and what was the object appearing from those circumstances, which the Legislature had in view (b), [and what were the cause and occasion of the passage of the act,<sup>4</sup> and the purpose intended to be accomplished by it,<sup>5</sup> in the light of the circumstances at the time, and the necessity of its enactment.<sup>6</sup> And where the act is a private one, the purpose of the beneficiaries in asking for it, as well as the object of the Legislature in enacting it may be looked at by the court.<sup>7</sup> But all these rules are to be understood as subject to the qualification, that, where the language is free from ambiguity, leads to no absurdity, and hence needs no interpretation, nothing beyond it can be regarded.\*]

§ 28. **Surrounding Facts and Circumstances.**—As regards the history, or external circumstances which led to the enactment, the general rule which is applicable to the construction of all other documents is equally applicable to statutes, viz., that the interpreter should so far put himself in the position of those whose words he is interpreting, as to be able to see what those words relate to. Extrinsic evidence of the circumstances or surrounding facts under which a will or contract was made, so far as they throw light on the matter to which the document relates, and of the condition and posi-

(a) *Per* Turner, L. J., in *Hawkins v. Gathercole*, 6 De G., M. & G. 1, 24 L. J. 338, citing *Stradling v. Morgan*, Plow. 204; and *Eyston v. Studd*, Id. 465.

<sup>3</sup> *McIntyre v. Ingraham*, 35 Miss. 25; *State v. Judge*, 12 La. An. 777.

(b) See *per* Lord Blackburn in *Wear Navig. Com. v. Adamson*, 2 App. 743.

<sup>4</sup> *Tonnele v. Hall*, 4 N. Y. (4 Comst.) 140; *Big Black Creek,*

*Co. v. Com'th*, 94 Pa. St. 450. See also *Bear's Adm'r v. Bear*, 83 Id. 525, 527.

<sup>5</sup> *Ruggles v. Illinois*, 108 U. S. 526; *Lake v. Caddo Parish*, 37 La. An. 788; *Crawfordville, &c. Co. v. Fletcher*, 104 Ind. 97.

<sup>6</sup> *Keith v. Quinney*, 1 Oreg. 364.  
<sup>7</sup> *Ruggles v. Illinois*, 108 U. S. 526.

<sup>8</sup> *Ibid.*; *State v. Brewster*, 42 N. J. L. 125; *Ezekiel v. Dixon*, 3 Ga. 146; and ante, § 4, et seq.



tion and course of dealing of the persons who made it or are mentioned in it, is always admitted as indispensable for the purpose not only of identifying such persons and things, but also of explaining the language, whenever it is patently ambiguous or susceptible of various meanings or shades of meaning, and of applying it sensibly to the circumstances to which it relates (*a*). ["A statute is a writing, equally with a will or a contract. And to a considerable extent the rules for the one class are those also for the other."<sup>9</sup> The meaning of doubtful language in a statute, whose words clearly may have different meanings when employed in different connections and under different circumstances or to effect different objects, may be sought for by the court in every legitimate way;<sup>10</sup> and in doing so, resort may be had to extrinsic circumstances.<sup>11</sup> Hence evidence of such extrinsic circumstances may become admissible, to show the intent of the Legislature;<sup>12</sup> as to show that a certain road was the only road which answered the description of a road that was the subject of legislation in a certain statute.<sup>13</sup>

§ 29. **History of Enactment.**—[If possible, a statute must be so construed as to make it effect the purposes for which it was intended.<sup>14</sup>] The interpreter, in order to understand the subject-matter and the scope and object of the enactment, must, in Coke's words, ascertain what was the mischief

(*a*) *Wigram Int. Wills*, Prop. 5; *Anstee v. Nelms*, 1 H. & N. 225, 26 L. J. 5, *per* Bramwell, B.; *Wood v. Priestner*, L. R. 2 Ex. 70; *Shortrede v. Cheek*, 1 A. & E. 57; *Baumann v. James*, L. R. 3 Ch. 508; *Doe v. Benyon*; 12 A. & E. 431; *Blundell v. Gladstone*, 3 Mc. N. & G. 692; *Turner v. Evans*, 2 E. & B. 515; *Graves v. Legg*, 9 Ex. 642; *Lewis v. G. W. R. Co.*, 3 Q. B. D. 202, *per* Bramwell, L. J.; *Re De Rosaz*, 2 P. D. 66; *Whitfield v. Langdale*, 1 Ch. D. 61; *Hill v. Crook*, L. R. 6 H. L. 283. [1 *Jarman, Wills*, (Rand. & Talcott) pp. 733 et seq.].

<sup>9</sup> *Bishop, Written Laws*, § 4.

<sup>10</sup> *People v. Shoonmaker*, 63 Barb. (N. Y.) 49.

<sup>11</sup> *Ibid.* In Louisiana, it is held,

that, in case of ambiguity in the English text of a statute, the French text may be consulted to explain the same: *Lafourche Parish v. Terrebonne Parish*, 34 La. An. 1230; though, in case of a discrepancy between the two texts, the English would have to prevail: *State v. Ellis*, 12 La. An. 390.

<sup>12</sup> *Smith v. Helmer*, 7 Barb. (N. Y.) 416.

<sup>13</sup> *Ibid.* In the same case it was held that the road mentioned in the statute as "from" a certain village, must, under the circumstances, be held to include a portion of the road within the village limits.

<sup>14</sup> *Lake v. Caddo Parish*, 37 La. An. 788.

or defect for which the law had not provided, that is, he must call to his aid all those external or historical facts which are necessary for this purpose, and which led to the enactment (*a*). [He must refer to the history of the times to ascertain the reason for, and the meaning of the provisions of a statute,<sup>15</sup> and to the general state of opinion, public, judicial and legislative, at the time of the enactment.<sup>16</sup> And the unmistakable evidence of such contemporaneous circumstances of the intention of the Legislature should govern the construction of a statute whose terms are left doubtful by its language, and whose object is the correction of an abuse.<sup>17</sup> For these purposes, the court, in interpreting a statute, will take judicial notice of contemporaneous history ; <sup>18</sup> or it] may consult contemporary or other authentic works and writings. In his celebrated judgment in the Alabama arbitration, Cockburn, C. J., showed, by a reference to their history, that both the American and English Foreign Enlistment Acts of the early part of the present century were intended, not to prevent the sale of armed ships to belligerents, but to prevent American and English citizens from manning privateers against belligerents (*b*). The 5 Geo. 4, c. 113, for the abolition of the slave trade, was construed to extend to offenses committed by British subjects out of the British dominions, that is, on the West Coast of Africa, by the light of the notorious fact that the crime against which the Act was directed, was mainly, if not exclusively committed there (*c*): though it may, perhaps, not have extended to our subjects in other parts of the world beyond our territories (*d*). An ordinance of the colony of Hong Kong, which authorized the extradition of

(*a*) *Gorham v. Bishop of Exeter*, Rep. by Moore, p. 462; see *per* Bramwell, B., in *Attorney-General v. Sillem*, 2 H. & C. 531.

<sup>15</sup> *Aldridge v. Williams*, 3 How. 9; *U. S. v. Union Pac. R. R. Co.* 91 U. S. 72; *Distr. of Columbia v. Washington Market Co.*, 108 Id. 243; *State v. Nichols*, 30 La. An. Part II. 980; *Lake v. Caddo Parish*, 37 Id. 788.

<sup>16</sup> *Keyport St. Co. v. Trans. Co.*, 18 N. J. Eq. 13; *Delaplane v.*

*Crenshaw*, 15 Gratt. (Va.) 457.

<sup>17</sup> *Fairchild v. Gwynne*, 16 Abb. Pr. (N. Y.) 23. Compare *Scott v. Guthrie*, 10 Bosw. (N. Y.) 408.

<sup>18</sup> *Lake v. Caddo Parish*, 37 La. An. 788.

(*b*) Supplement to the *London Gazette*, 20 Sept., 1872, p. 4135.

(*c*) *R. v. Zulueta*, 1 Car. & K. 215.

(*d*) *Per* Bramwell B., in *Santos v. Illidge*, 29 L. J. C. P. 348, 8 C. B. N. S. 861.

Chinese subjects to the government of China, when charged with "any crime or offense against the law of China," was construed, either by reference to the circumstances under which the treaty, which the ordinance enforced, had been made, or to the geographical relation of Hong Kong to China, as limited to those crimes which all nations concur in proscribing (*a*). An Act which authorized "the Court" before which a road indictment was preferred, to give costs, was construed as authorizing the judge at Nisi Prius to do so, partly on the ground of the well-known fact that such indictments were rarely tried by the Court in which they were, in the strict sense of the word, "preferred" (*b*). [And so, an act relating to civil actions was held not to require the filing of complaint and notice with the clerk as the first step, but to permit the service thereof on the defendant before presentation to the clerk for filing, because of the delay and expense of travel, which, it was known, would otherwise result to suitors.<sup>19</sup>]

The external circumstances which may be thus referred to, do not, however, justify a departure from every meaning of the language of the Act. Their function is limited to suggesting a key to the true sense, when the words are fairly open to more than one, and they are to be borne in mind, with the view of applying the language to what was intended and of not extending it to what was not intended (*c*). [Nor is reference permissible to any traditional history of an enactment, unless it resulted from some known state of embarrassment under the former law.<sup>20</sup>]

§ 30. **Parliamentary History. Opinions of Legislators.**—Reference has been occasionally made to what the framers of the Act, or individual members of the Legislature intended to do by the enactment, or understood it to have done. Chief Justice Hengham said that he knew better than counsel the meaning of the 2nd Westminster, as he had drawn

(*a*) Attorney General v. Kwok Ah Sing, L. R. 5 P. C. 179, 197.

(*b*) R. v. Pembridge, 3 Q. B. 901.

<sup>19</sup> Keith v. Quinney, 1 Oreg. 364.

(*c*) Semble; see the dictum of Jessel, M. R., in Holme v. Guy, 5 Ch. D. 905.

<sup>20</sup> Barker v. Esty, 19 Vt. 131.

up that statute (*a*). Lord Nottingham claimed that he had some reason to know the meaning of the Statute of Frauds, because, he said, it had had its first rise from him, he having brought it into the House of Lords (*b*). Lord Kenyon supported his construction of the statute 9 Anne, c. 20, by the argument that so accurate a lawyer as Mr. Justice Powell, who had drawn it, never would have used several words where one sufficed (*c*). In determining the meaning of the rubric on vestments in the prayer-book (enacted by the Uniformity Act, 13 & 14 Car. 2, c. 4), the Privy Council, in one Ecclesiastical case, referred to the introduction of a proviso by the Lords in that Act, and its rejection by the Commons, and to the reasons assigned by the latter, in the conference which ensued, for the rejection, as an indication of the intention of the Legislature (*d*); and in another, to a discussion between the bishops who framed or revised the rubric and the Presbyterian divines at the Savoy Conference in 1662, as showing the meaning attached to it by the former (*e*). Lord Westbury, when Chancellor, referred to a speech made by himself, as Attorney-General, in the House of Commons, in 1860, in introducing the Bankruptcy Bill, which was passed into law in the following year; and one of his reasons in favor of the construction which he put on the Act was that it tallied best with the intention which the Legislature might be presumed to have adopted, as it was the ground on which application had been made to it. But he observed, at the same time, that he had endeavored, in forming his opinion, to divest his mind, as far as possible, of all impressions received from the past, and to consider the language of the Act as if it had been presented to him for the first time in the case before him (*f*). [So, Gibson, the great chief justice of Pennsylvania, in a case which involved the question whether or not a certain act was impliedly repealed by another passed by the Legislature of 1812, said: "Having been a member of the Legislature in

(*a*) Year book of 33 Ed. 1, p. xxxi.

(*b*) Sec Ash v. Abdy, 3 Swanst. 634.

(*c*) R. v. Wallis, 5 T. R. 379.

(*d*) Hebbert v. Purchas, L. R. 3 C. P. 648.

(*e*) Ridsdale v. Clifton, 2 P. D. 322.

(*f*) Re Mew, 31 L. J. Bcy. 89

1812, I know that no repeal was in fact contemplated"; but the decision to that effect proceeds upon other reasons as well, establishing the conclusion reached independently of such personal recollection.<sup>21</sup>] The reports furnish other instances (a). But it is unquestionably a rule that what may be called the parliamentary history of an enactment is "wisely inadmissible" to explain its meaning (b). Its language can be regarded only as the language of the three states of the realm, and the meaning attached to it by its framers or by members of either house of parliament cannot control the construction of it (c). ["In giving construction to a statute, we cannot be controlled by the views expressed by a few members of the Legislature, who expressed verbal opinions on its passage. Those opinions may or may not have been entertained by the more than a hundred members who gave no such expression. The declarations of some, and the assumed acquiescence of others therein, cannot be adopted as a true interpretation of the statute."<sup>22</sup>] Indeed, the inference to be drawn from comparing the language of the Act with the declared intention of its framers would be that the difference between the two was not accidental but intentional (d). [The court is, therefore, not at liberty to recur to the views of individual members of the Legislature, in debate, to ascertain the meaning of a statute,<sup>23</sup> or, at the most, the views so expressed as to the object and effect of particular provisions of an act under discussion are entitled

<sup>21</sup> *Moyer v. Gross*, 2 Penr. & W. (Pa.) 171, 172.

(a) *Ex. gr. per Hale*, C. B., in *Hedworth v. Jackson*, Hard. 318; *McMaster v. Lomax*, 2 Myl. & K. 32; *Mounsey v. Imray*, 34 L. J. Ex. 56, 3 H. & C. 486; *Drummond v. Drummond*, L. R. 2 Ch. 45; *Hudson v. Tooth*, 3 Q. B. D. 46, 47 L. J. 24. [See also *State v. Nicholls*, 30 La. An., P. II. 980.]

(b) See *ex. gr. per Cur.* in *R. v. Hertford College*, 3 Q. B. D. 707; *per Pollock*, C. B., in *Atty.-Gen. v. Sillem*, 2 H. & C. 521, and *per Bramwell*, B., 537.

(c) *Dean of York's Case*, 1 Q. B. 34. *Per Pollock*, C. B., and *Parke*,

B., in *Martin v. Hemming*, 10 Ex. 476, 24 L. J. Ex. 5; *Cameron v. Cameron*, 2 M. & K. 289; *Hemstead v. Phoenix Gas Co.*, 3 H. & C. 745, 34 L. J. Ex. 108.

<sup>22</sup> *Per Cur.*, in *Cumberland Co. v. Boyd*, 113 Pa. St. 52, 57.

(d) *Per Tindal*, C. J., in *Salkeld v. Johnson*, 2 C. B. 757. And see *Farley v. Bonham*, 2 Johns. & H. 177, 30 L. J. Ch. 239.

<sup>23</sup> *District of Columbia v. Wash. Market Co.*, 108 U. S. 243; 3 Mc Arthur (D. C.) 559; *U. S. v. Union Pac. R. R. Co.*, 91 U. S. 72; *Aldridge v. Williams*, 3 How. 9; *Cumberland Co. v. Boyd*, 113 Pa. St. 52.

to very little weight.<sup>24</sup> It follows that it cannot be permitted to show the knowledge of the members of a Legislature of the existence of a custom at the date of the passage of an act, in order to argue, from their silence, an intention to sanction it.<sup>25</sup>

§ 31. **Motives of Legislators.**—[Like the opinions expressed by Legislators upon the passage of a statute, the motives and designs which actuated them in supporting it cannot be inquired into by the court, in order to make the validity of an act depend upon the intention resulting from such an inquiry;<sup>26</sup> even though, as in a quo warranto, the state be the plaintiff.<sup>27</sup>]

§ 32. **Proceedings, etc., of Committees.**—What took place before a committee cannot be invoked for putting a construction on a private Act (*a*). [Similarly, it has been held in England that no legitimate guide to the construction of a statute can be found in the recommendations and reports of commissions, which preceded the passage thereof and upon which it was founded, as the reports and recommendations of the Real Property Commissioners,<sup>28</sup> of the Ecclesiastical

<sup>24</sup> *Leese v. Clark*, 20 Cal. 387, 425; *Taylor v. Taylor*, 10 Minn. 107. And see *Keyport, etc. Co., v. Trans. Co.*, 18 N. J. Eq. 13; and compare *Bish., Writ. Laws*, §§ 76, 77.

<sup>25</sup> *Delaplane v. Crenshaw*, 15 Gratt. (Va.) 457.

<sup>26</sup> *Barbier v. Connolly*, 113 U. S. 27; *Soon Hing v. Crowley*, Id. 703; *Kountze v. Omaha*, 5 Dill. Ct. 443; *People v. Shephard*, 36 N. Y. 285; *Pa. R. R. Co. v. Riblet*, 66 Pa. St. 164, 169; *Exp. Newman*, 9 Cal. 502; *Harpending v. Haight*, 39 Id. 189; *State v. Hays*, 49 Mo. 604; *Bradshaw v. Omaha*, 1 Neb. 16.

<sup>27</sup> *McCullock v. State*, 11 Ind. 424. See, as to direct proceedings to impeach an act for fraud not apparent on its face, *Wetmore v. Law*, 34 Barb. (N. Y.) 515; *Oakland v. Carpentier*, 21 Cal. 642. In England, the rule seems absolute that courts cannot inquire how an act of Parliament may have been passed, how far the parties affected

by it may have had an opportunity of being heard, how far the forms of procedure which are prescribed by the houses of Parliament may have been followed: *Wilberforce, Stat. Law*, p. 24, cit. *Earl of Shrewsbury v. Scott*, 6 C. B. N. S., at p. 160; *Edinburgh R. R. Co. v. Wanchope*, 8 Cl. & Fin., at pp. 723-5; that, where an act has been improperly obtained, the Legislature alone can provide a remedy, the courts not being permitted to allow the authority of the Legislature to be impeached by a suggestion that an act of Parliament has been obtained by fraud: *Wilb.* pp. 24-25, cit. *Lee v. Bude, etc. R. R. Co.*, L. R. 6 C. P., at p. 582; *Waterford R. R. Co. v. Logan*, 14 Q. B. 672, 680; *Stead v. Carey*, 1 C. B. at p. 516.

(*a*) *Steele v. Midland R. Co.*, L. R. 1 Ch. 282.

<sup>28</sup> *Salkeld v. Johnson*, 2 C. B. 756; *Farley v. Bonham*, 2 J. & H. 177; 30 L. J. C. 239.

Commissioners," of the Common Law" and chancery commissioners." And the rule seems to be the same in this country," although perhaps not followed with universal consistency."

§ 33. **Legislative Journals.**—[The journals of the Legislature, however, whilst they "are not evidence of the meaning of a statute, because this must be ascertained from the language of the act itself, and the facts connected with the subject on which it is to operate" <sup>34</sup> may nevertheless, under certain circumstances and for certain purposes, be consulted by the court. They are not only the highest evidence of the enactment of a law, <sup>35</sup> so that they may be consulted to show that a part of a bill signed by the executive was in fact, repealed before the date of such signature; <sup>36</sup> but in a case where the statute, the construction of which was in question, was so worded as to be apparently contradictory in some of its provisions, the Supreme Court of the United States interpreted the same by reference to the journals of Congress, from which it appeared that the peculiar phraseology was the result of the introduction of an amendment, without due reference to the wording of the original bill. <sup>37</sup> And a provision in a statute reading that "no lien reserved on personal property sold conditionally and passing into the hands of the conditional purchaser shall be valid against attaching creditors or purchasers without notice," was construed as though there were a comma after "purchasers," such being the punctuation in the original bill as passed by the Legislature though it was not so printed in the copy. <sup>38</sup> And an act

<sup>32</sup> Matter of Dean of York, 2 Q. B. 34.

<sup>30</sup> Martin v. Hemming, 24 L. J. Ex. 5; 18 Jur. 1002; Arding v. Bonner, 2 Jur. N. S. 763.

<sup>31</sup> Ewart v. Williams, 3 Drew. 21, 24.

<sup>33</sup> See Bank of Pa. v. Com'th, 19 Pa. St. 144, 156, where evidence of the reports of committees inter alia, is said to be "not only of no value," but "delusive and dangerous;" and see Bish., Writ. Laws, § 77.

<sup>35</sup> See post, § 68.

<sup>34</sup> Southwark B'k. v. Com'th, 26

Pa. St. 446, 450. But see Edger v. Co. Comm'rs, 70 Ind. 331.

<sup>36</sup> Southwark B'k v. Com'th, supra.; and of the time of its enactment: Gardner v. Collector, 6 Wall. 499.

<sup>35</sup> Southw. B'k. v. Com'th, ubi supra.; and see People v. Starne, 35 Ill. 121. Compare Sherman v. Story, 30 Cal. 253.

<sup>37</sup> Blake v. Nat. Banks, 23 Wall. 307, 321.

<sup>38</sup> McPhail v. Gerry, 55 Vt. 174. In Edger v. Co. Comm'rs, 70 Ind. 331, it is said that the court may

approved May 3, 1852, which provided that it should take effect from and after "May 15, next," was, partly by reference to the legislative journals, which showed it to have been finally passed on Apr. 28, 1852, construed as taking effect from and after May 15, 1852."]

§ 34. **Usage.**—Another class of external circumstances which have, under peculiar circumstances, been sometimes taken into consideration, in construing a statute, consists of acts done under it; for usage may determine the meaning of the language, at all events when the meaning is not free from ambiguity (*a*).

§ 35. **All Parts of Statute to be Compared.**—Passing from the external history of the statute to its contents, it is an elementary rule that construction is to be made of all the parts together, and not of one part only by itself (*b*).

consult the journals of the two houses of the Legislature to ascertain its will and intention, where the statute to be interpreted is ambiguous,—*cit.* Wood Mowing, &c. Co. v. Caldwell, 54 Id. 270.

<sup>39</sup> Fosdick v. Perrysburgh, 14 Ohio St. 427. For the purposes of construction, and of ascertaining whether an act has been passed according to the forms required by the constitution to give it validity, the courts judicially notice the contents of the Legislative journals, which need not, therefore, be pleaded or given in evidence: Moody v. State, 48 Ala. 115; Clare v. State, 5 Iowa, 509; People v. Mahaney, 13 Mich. 481; Division of Howard Co., 15 Kan. 194. But see *contra*: Grob v. Cushman, 45 Ill. 119; Coleman v. Dobbins, 8 Ind. 156; Madison Co. v. Burford, 93 Ind. 383; Auditor v. Haycraft, 14 Bush. (Ky.) 284. In *State v. Auditor*, 41 Mo. 240, under an act making it the duty of the state senate to cause its journals to be printed, it was held that the Appendix thereto made up of reports and public documents, was a part thereof; and that the secretary of the senate was therefore entitled to receive the same pay for copying it for the press as for

copying the record to the senate's daily proceedings.

(*a*) See *ex. gr.* R. v. Levenson, L. R. 4 Q. B. 394, and other cases referred to, *inf.* §§ 357 et seq.

(*b*) Co. Litt. 381a; Lincoln College Case, 3 Rep. 59b. [S. P.: Pennington v. Cox, 2 Cranch. 33; Rice v. R. R. Co., 1 Black, 358; Wilkinson v. Leland, 2 Pet. 627; Atkins v. Disintegrating Co., 18 Wall. 272; U. S. v. Bassett, 2 Story, 389; Ogden v. Strong, Paine, 584; Strode v. Stafford Justices, 1 Brock. Marsh. 162; Com'th v. Alger, 7 Cush. (Mass.) 53; Holbrook v. Holbrook, 1 Pick. (Mass.) 248; Mendon v. Worcester, 10 Id. 235; Com'th v. Cambridge, 20 Id. 267; Mason v. Finch, 3 Ill. 223; Belleville R. R. Co. v. Gregory, 15 Id. 20; Burke v. Monroe, 77 Id. 610; Thompson v. Bulson, 78 Ill. 277; Williams v. People, 17 Ill. App. 274; Davy v. Burlington, &c. R. R. Co., 31 Iowa, 553; Brooks v. Comm'rs, 31 Ala. 227; Elleson v. Mobile, &c. R. R. Co., 36 Miss. 572; State v. Mayor of Patterson, 35 N. J. L. 197; Com'th v. Duane, 1 Binn. (Pa.) 601; Com'th v. Conyngham, 66 Pa. St. 99; Holl v. Deshler, 71 Id. 299; San Francisco v. Hazen, 5 Cal. 169; Taylor v. Palmer, 31 Id. 240.]



Incivile est, nisi tota lege perspecta, una aliqua particula ejus proposita, judicare vel respondere (a). [Ex antecedentibus et consequentibus fit optima interpretatio.<sup>40</sup> A survey of the entire statute is almost] always indispensable, even when the words are the plainest; for the true meaning of any passage is that which best harmonizes with the subject, and with every other passage of the statute. If one section of an Act, for instance, required that "notice" should be "given," a verbal notice would probably be sufficient; but if a subsequent section provided that it should be "served" on a person, or "left" with him, or in a particular manner or place, it would obviously show that a written notice was intended (b). [So, if one section of an act required that a certain notice should be published for ten days in succession, and another that all notices should be published daily, Sundays excepted, the two sections, read together, would indicate that the Sundays should be included for enumeration but not for publication.<sup>41</sup>] The second section of Lord Tenterden's Prescription Act, 2 & 3 Will. 4, c. 71, in protecting "any right of common" from disturbance after certain periods of enjoyment, uses an expression which unambiguously includes all rights of common, that is, those in gross as well as those appurtenant. But the fifth section, which in providing a form of pleading to be applicable to all rights within

Gates v. Salmon, 35 Id. 576; Berry v. Clary, 77 Me. 482; Atty. Gen. v. Bank, Harr. (Mich.) 315; Atty. Gen. v. Detroit, &c. Co., 2 Mich. 138; Reynolds v. Baldwin, 1 La. An. 162; Success'n of Hebert, 5 Id. 121; Catlin v. Hull, 21 Vt. 152; Ryegate v. Wardsboro, 30 Id. 746; Maple Lake v. Wright Co., 12 Minn. 403; St. Peter's Church v. Scott, Id. 395; Canal Co. v. R. R. Co., 4 Gill & J. (Md.) 1; Magruder v. Carroll, 4 Id. 335; Alexander v. Worthington, 5 Id. 471; Parkinson v. State, 14 Id. 184; Stockett v. Bird, 18 Id. 484; Rugles v. Washington Co., 3 Mo. 496; State v. Weigel, 48 Id. 29; Green v. Cheek, 5 Ind. 105; Crone v. State, 49 Id. 538; Nichols v. Wells, Sneed, (Ky.) 301; Covington v. McNickle, 18 B. Mon. (Ky.) 262; Torrance v. McDougald, 12

Ga. 526; Wilson v. Briscoe, 11 Ark. 44; Scott v. State, 22 Id. 369; Gas Co. v. Wheeling, 8 W. Va. 320.

(a) Dig. 1, 3, 34.

<sup>40</sup> 2 Inst. 173; Holl v. Deshler, 71 Pa. St. 299, 301. Even where a proviso in an act is ineffectual, because unconstitutional, it cannot be disregarded in the interpretation: Com'th v. Potts, 79 Pa. St. 164. See § 49.

(b) 43 & 44 Vict. c. 42; 2 W. & M. c. 5; Moyle v. Jenkins, 51 L. J. Q. B. 112; Wilson v. Nightingale, 8 Q. B. 1034. [A provision merely requiring a party to "notify" another requires verbal notification only: Vinton v. Builders', etc., Ass'n, 109 Ind. 351.]

<sup>41</sup> Taylor v. Palmer, 31 Cal. 240.

the Act, gives a form which could, from its nature, be applicable only to rights appurtenant, shows that the wide expression in the earlier section was used in the restricted sense of a right of common appurtenant (*a*). So, in the Dower Act, of 3 & 4 Will. 4, c. 105, the word "land," which it defines as including manors, messuages, and all other hereditaments, both corporeal and incorporeal, except such as are not liable to dower, was held not to include copyhold lands; because the sixth section, which provides that a widow shall not be entitled to dower, when "the deed" by which the land was conveyed to her husband contains a declaration to that effect, showed that only lands which were transferable by deed were within the contemplation of the Legislature (*b*). Where one section of an Act empowered the Board of Trade, when it had "reason to believe" that a ship could not go to sea without serious danger to human life, to detain it for survey; and another gave the shipowner a right to compensation if it appeared that there was not reasonable cause for its detention, by reason of the condition of the ship or the act or default of the owner; it was held that the latter section so modified the sense of the earlier one, that the Board of Trade would be liable to compensate the owner, though it had reasonable ground for belief when it ordered the detention, if it appeared from the evidence at the trial that a person of ordinary skill would have thought that there was no reasonable ground for detention (*c*).

§ 36. So, where one section of the 25 & 26 Vict. c. 102, enacted, that if "any building" projecting beyond the general line of the street was pulled down, the Board of Works might order it to be set back, giving compensation; and the next enacted that under certain circumstances "no building" should be erected in any street, without the consent of the Board, beyond the general line; the latter section, which, per se, would have included alterations, whether on new or old, was confined by the former to buildings erected

(*a*) *Shuttleworth v. Le Fleming*, 19 C. B. N. S. 687, 34 L. J. C. P. 309.

(*b*) *Smith v. Adams*, 5 De G., M. & G. 712, 24 L. J. Ch. 258; *Powd-*

*rell v. Jones*, 2 Sm. & G. 407, 24 L. J. Ch. 123. *Comp. Doe v. Waterton*, 3 B. & A. 149.

(*c*) *Thompson v. Farrer*, 8 Q. B. D. 372.

on land which had been hitherto vacant (a). Where one section of an Act imposed a penalty for selling "as unadulterated" articles of food which are in fact adulterated; and another declared that a person who sold an article of food "knowing it to have been mixed with another substance to increase its bulk or weight," and did not, in selling it, declare the admixture to the purchaser, should be deemed to have sold an adulterated article, the different wording of the two sections showed that under the former the seller would be liable though he was ignorant of the adulteration (b). One section of the Companies Act of 1862, which enacts that where a company is being wound up by the Court, or under its supervision, any distress or execution put in force against the property of the company after the commencement of the winding up "shall be void to all intents," is so modified by another which enacts that when an order for winding up has been made, no action or other proceeding shall be proceeded with against the company, except with the leave of the Court, that its true meaning and effect is only to invalidate the proceedings which it pronounces void, when the Court does not sanction them (c). The clause in the Ballot Act of 1872 which in express terms requires the presiding officer at each station to exclude all persons except the clerks, the agents of the candidates, and the constables, on duty, was found to include also the candidates themselves in the exception, since a subsequent clause provides that a candidate may be present at any place at which his agent may attend (d).

§ 37. **Context may Limit or Expand Meaning.**—[Partly by a construction of all the provisions of an act together, it was ascertained that the requirements of a statute relating to pilots, though general in their terms, were not intended to embrace men of war of the United States, but only to merchant vessels, because the provision giving the pilot whose

(a) Lord Auckland v. Westminster Board of Works, L. R. 7 Ch. 597. See Doe v. Olley, 12 A. & E. 481.

(b) 23 & 24 Vict. c. 84; Fitzpatrick v. Kelly, L. R. 8 Q. B. 337. See also Core v. James, L. R. 7 Q.

B. 135; and Roberts v. Egerton, L. R. 9 Q. B. 494.

(c) *Re* The London Cotton Co., L. R. 2 Eq. 53.

(d) 35 & 36 Vict. c. 33, s. 9, cl. 21 & 51; Clemenston v. Mason, L. R. 10 C. P. 209.

fees remained unpaid a lien upon the hull, tackle, etc., could manifestly be applicable only to the latter class," it being fairly inferred, where a duty is prescribed by a statute and remedies are provided for the breach of it, and these remedies are such that they cannot be applied to a particular subject, that the subject was not within the view of the Legislature when it exacted the duty.<sup>42</sup> So, where two sections of an act defined the degrees of murder, and the third provided that "the degree of murder shall be found by the jury," the latter provision was held inapplicable to cases where the accused pleaded guilty.<sup>43</sup> Conversely a grant of power conferred in general terms in the first section, was limited by a construction which read that section together with the twenty-third.<sup>44</sup> So, an absolute direction, in one section, to set aside a homestead for a decedent's widow and children, free from all debts of the decedent, was restricted by an intention disclosed in succeeding sections to subject such homestead to debts contracted before the passage of the act.<sup>45</sup> And as a survey of the whole act may restrict the generality of certain of its provisions,<sup>46</sup> so it may expand the narrowness of others, if the real intention of the Legislature may be gathered from broader expressions in other parts of the statute. Thus, the object of an act being to restore uniformity of taxation in counties, tc., and repealing, for that purpose, all laws requiring any city to assume certain liabilities imposed by general laws upon counties, it was held that the term "cities" must be held to include incorporated towns.<sup>47</sup>

§ 38. Context may explain Meaning.—[The effect of a comparison of all the parts of a statute is frequently to explain, rather than to limit or enlarge, an expression somewhere in

<sup>42</sup> Ayers v. Knox, 7 Mass. 306.

<sup>43</sup> Ibid., p. 310.

<sup>44</sup> Green v. Com'th, 12 Allen (Mass.) 155; Comp. post, § 215.

<sup>45</sup> Maple Lake v. Wright Co., 12 Minn. 403.

<sup>46</sup> Simonds v. Powers, 28 Vt. 354.

<sup>47</sup> See Stockett v. Bird, 18 Md. 484; Covington v. McNickle, 18 B. Mon. (Ky.) 262; Electro-M.,

&c. Co. v. Van Auken, 9 Col. 204.

<sup>49</sup> Burke v. Monroe Co., 77 Ill. 610. And see Gas Co. v. Wheeling, 8 W. Va. 320, where it is said, that, the context showing a particular intention to effect a certain purpose, some degree of implication may be called in to aid the intent.

the statute, which is open to several interpretations. Thus an act provided for the appointment by the governor of the state, "upon the passage" of the act, of inspectors of mines, upon the recommendation, however, of certain examiners, who were to be appointed by the court of common pleas at the first term of the court in each year, the act being passed after the first term of the court in that year. In another preceding section, certain duties were imposed upon the inspectors and penalties inflicted for disobedience to their orders. It was held that a view of the whole act required that it should be so construed as to direct the appointment of examiners immediately, and in future years at the first term of the court.<sup>60</sup> Again, an act directed that corporations might be dissolved by the court of common pleas of the "proper county." It was held that the "proper" county was the county, in which, by the fundamental articles of agreement between the corporators, upon which the decree of incorporation was based, the principal office of the company should be located; because, by reference to other portions of the act, it appeared that the same required the agreement to set forth "the place within which" the corporation was established,—notice of the first meeting "in some newspaper printed in the county in which said corporation proposes to conduct its business,"—the depositing of notes of confirmation with the recorder of deeds "in said county,"—the recording of certificates of the amount of capital fixed and paid in the office of the recorder "for said county,"—and the like.<sup>61</sup> So, too, where the language of one section of an act requiring certain notice of sheriff's sales, etc., was such as to indicate an intention to render sales without the notice prescribed void, such construction was negatived by the next section, which clearly imposed only a penalty on the officer for neglecting to comply with the requirement.<sup>62</sup> Where an act relating to contested elections of senators provided, that, in case there be no law judge of the "district" in which any contest should arise, qualified to act, a certain other judge should be called

<sup>60</sup> *Com'th v. Conyngham*, 66 Pa. St. 99.

<sup>61</sup> *Com'th v. Slifer*, 53 Pa. St. 71.

<sup>62</sup> *Smith v. Randall*, 6 Cal. 47.

in to preside at the trial, it was held, upon comparison of the section in which this provision occurred with the preceding one, which directed that the contest should be determined before the court of the county where the person returned should reside, that the word "district" meant judicial, not senatorial, district.<sup>53</sup> In another case the context was held definitely to fix the meaning of the word "attorneys" occurring in a statute as "attorneys at law."<sup>54</sup> And again, the phrase "out of the jurisdiction of any particular state," was ascertained by comparison of the context, from which it appears that this phrase "particular state" was uniformly used in contradistinction to "United States," to mean any particular state of the Union.<sup>55</sup>

§ 39. **Context may Correct Errors.**—[Again, it is said that a mistake apparent on the face of an act may be corrected by other language in the act itself;<sup>56</sup> so that, for instance, the evident omission of a word, in one section, which would affect the meaning, may, where the omission is explained in another part of the statute by reference to such section as intended, be supplied according to such explanation.<sup>57</sup>]

§ 40. **Context to be Consulted to Avoid Inconsistency. Amendments, etc.**—In all these instances, the Legislature supplied in the context the key to the meaning in which it used expressions which seemed free from doubt; and that meaning, it is obvious, was not [in all cases] that which literally or primarily belonged to them. [It has been heretofore<sup>58</sup> seen that it is a necessity of proper statutory construction, to give effect to every word, clause and provision of the enactment. Possibly the most important purpose of the construction of all the parts of a statute together and with reference to one another, is that of giving, by the means of such comparison, a sensible and intelligent effect to each, without permitting any one to nullify any other, and to harmonize every detailed provision of the statute with the general purpose or partic-

<sup>53</sup> *Cumberland Co. v. Trickett*, 107 Pa. St. 118.

<sup>54</sup> *Cooper v. Shaver*, 101 Pa. St. 547, 549.

<sup>55</sup> *U. S. v. Furlong*, 5 Wheat. 184.

<sup>56</sup> *Blanchard v. Sprague*, 3 Sumn. 279.

<sup>57</sup> *Brinsfield v. Carter*, 2 Ga. 143. See upon this subject, also post, §§ 298-302, 317, 319.

<sup>58</sup> Ante, § 23

ular design which the whole is intended to subserve." With this end in view, the rule extends to acts and their amendments, which, for this purpose, are regarded as constituting but one enactment, so that no portion of either is to be left without effect, if it can be made operative without wresting the words used by the Legislature from their appropriate meaning,<sup>59</sup> and of two constructions equally warranted by the language of an amendment, that is to be preferred which best harmonizes the same with the general tenor and spirit of the act amended.<sup>61</sup> The same rule applies as to acts and their supplements,<sup>62</sup> and still more obviously to codes and revisions. A code, or body of revised laws, should, it is said, be regarded as a system of contemporaneous acts,<sup>63</sup> as established *uno flatu*.<sup>64</sup> Its various sections relating to the same subject should, if practicable, be construed together,<sup>65</sup> as one,<sup>66</sup> as one act or chapter,<sup>67</sup> or as continuous sections of the same act;<sup>68</sup> and one chapter is to be read with another, relating to the same subject, as one body of law,<sup>69</sup> though collected from independent laws of previous enactment,<sup>70</sup> originally passed at different times and re-enacted by a revisory act.<sup>71</sup> If possible, the various portions of such a code or revision must be so construed as to harmonize with one another.<sup>72</sup> Its general system of legislation upon the subject matter should be taken into view, and any particular article construed in conformity therewith, unless an intention to depart from it be clearly shown;<sup>73</sup> and definitions contained in it are to be

<sup>59</sup> See cases in note (b) to § 35.

<sup>60</sup> *Harrell v. Harrell*, 8 Fla. 46.

<sup>61</sup> *Griffin's Case*, Chase Dec. 364.

<sup>62</sup> *Van Riper v. Essex R. R. B'd.* 38 N. J. L. 23. And as to a repealing act and an act suspending its operation, both passed at the same session of the legislature, being construed as one act, so that both may have effect, see *Brown v. Berry*, 3 Dal. 365.

<sup>63</sup> *Ashley v. Harrington*, 1 D. Chip. (Vt.) 348.

<sup>64</sup> *Gibbons v. Brittenum*, 56 Miss. 232. And see *Com'th v. Goding*, 3 Metc. (Mass.) 130.

<sup>65</sup> *Exp. Ray*, 45 Ala. 15; *O'Neal v. Robinson*, Id. 526; *Mobile, &c. R. R. Co. v. Malone*, 46 Id. 391;

*Bryant v. Livermore*, 20 Minn. 313; *Smith v. Smith*, 19 Wis. 522; *Gallegos v. Pino*, 1 New Mex. 410.

<sup>66</sup> *Mobile, &c. R. R. Co. v. Malone*, supra.

<sup>67</sup> *Smith v. Smith*, supra.

<sup>68</sup> *Gallegos v. Pino*, supra.

<sup>69</sup> *Bryant v. Livermore*, supra.

<sup>70</sup> *Mobile, &c. R. R. Co. v. Malone*, supra.

<sup>71</sup> *Gallegos v. Pino*, supra.

<sup>72</sup> *Gibbons v. Brittenum*, 56 Miss. 232.

<sup>73</sup> *Childers v. Johnson*, 6 La. An. 634. Compare *Bank of La. v. Farrar*, 1 Id. 54, where it is said that the civil code of the State is not to be considered as technically a statute.

construed with reference to its positive enactments in *pari materia*.<sup>74</sup>

§ 41. **Limits of Rule Requiring Context to be Consulted.**—[The rule commending a consideration of the whole statute, in order to discover the sense in which words are used in a particular portion of it, is subject, however, to this qualification, that, if the meaning of a word can be found in the section itself in which it is used, it ought to be there sought for, without recourse to anything beyond.<sup>75</sup> It is only where the meaning of the word or phrase cannot be satisfactorily ascertained from reading the particular section; or where the meaning which such a limited view gives to it, would raise a conflict or incongruity as compared with other portions of the statute, that a reference to the latter is proper. And where there are general sweeping words which it would be difficult to apply in their full literal sense, it is one of the safest guides to construction, to examine other words of like import in the same statute, and if it is found that a number of such expressions have to be subjected to limitations or qualifications, and that such limitations and qualifications are of the same nature, that forms a strong argument for subjecting the expression in dispute to a like limitation or qualification:<sup>76</sup> the reason for this concession being, that it is presumed, that the Legislature used a word throughout the entire act in the same sense.<sup>77</sup>]

§ 42. **Statute Embodying Several Distinct Acts.**—It has been observed, that when an Act embodies several distinct Acts, one part throws no further light on the other parts than would be cast upon them by separate and distinct enactments to the same effect (a). [But where an act incorporates another and provides that the two shall be construed as one,

<sup>74</sup> *Egerton v. Third Municipality*, 1 La. An. 435; *Depas v. Riez*, 2 Id. 30; and they have no meaning beyond: *Ibid.* See also *Ala. Warehouse Co. v. Lewis*, 56 Ala. 514.

<sup>75</sup> *Spencer v. Metropol. B'd.*, L. R. 22 Ch. Div. 162, *per* Jessel, M. R.

<sup>76</sup> *Blackwood v. Reg.*, L. R. 8 App. Cas. 94.

<sup>77</sup> *Spencer v. Metropol. Board*,

*supra*; *Pitte v. Shipley*, 46 Cal. 154.

(a) *Per* Turner, L. J., in *Cope v. Doherty*, 4 K. & J. 367, 27 L. J. 600. [And it has been said that each chapter of a body of Revised Statutes is a statute or act on the subject to which it relates; and may, in penal suits, be referred to as a statute of the State: *Cleaves v. Jordan*, 35 Me. 429. Compare *ante*, § 40.]



the use, in one of the acts of the phrase "this act" will include not only the act itself in which it occurs, but earlier and later acts which are so treated as forming part of the same statute. An act provided that "in the construction of this act," the word "parish" should include "city." A later act, incorporating the provisions of the former and directing that the two should be construed as one, enacted that no person should be removed from any parish in which he had resided for five years. It was held, that by the combined operation of the two acts, no person could be removed from a city in which he had resided for five years.<sup>78</sup> Conversely, where an act passed in 1867, provided that it and certain acts passed in 1856 should be construed together as one act, and the former declared that "the words County Court when used in this act, or any future act, shall include the City of London Court;" it was held, that, by virtue of these words, the provisions of the act of 1856 applied to the City of London Court.<sup>79</sup> So, again, an act passed in 1866, which was to be construed as one with another passed in 1855, enacted that "the provisions this act" should not extend to certain manufacturers; and it was held that by the effect of that provision, the manufacturers in question were exempted from the operation of the earlier act.<sup>80</sup> But this rule does not extend to penal statutes, the construction of which, upon a principle which will be hereafter discussed,<sup>81</sup> is to be confined to the more literal meaning of the language. Hence, in such acts, the term "this act," bears its literal significance, and refers only to the act itself in which it occurs, though the act is made part of another and to be construed with it.<sup>82</sup>

<sup>78</sup> R. v. Fornsett St. Mary, 12 Q. B. 160.

<sup>79</sup> Blades v. Lawrence, L. R. 9 Q. B. 374. But see Mather v. Brown, L. R. 1 C. P. D. 596, where, although an act passed in 1857 declared it was to be construed as one with another and earlier act, it was held that the effect of the provision was not to incorporate in the later act the provisions of the earlier; so that, though the latter remedied every misnomer, &c., in a voting paper

required by "this act," a misnomer, &c., in a voting paper required by the later act was held uncured and fatal.

<sup>80</sup> Norris v. Barnes, L. R. 7 Q. B. 537. And see Wilb. Stat. Law, pp. 264-266, from which the observations in this section are largely borrowed.

<sup>81</sup> See post, §§ 329, seq.

<sup>82</sup> R. v. Trustees, 5 A. & E. 563; R. v. Johnson, 8 Q. B. 102; R. v. Jesse Smith, L. R. 1 C. C. R. 266.

§ 43. **Earlier Acts in Pari Materia.**—Where there are earlier Acts relating to the same subject, the survey must extend to them; for all are, for the purposes of construction, considered as forming one homogeneous and consistent body of law (*a*), and each of them may explain and elucidate every

(*a*) *R. v. Loxdale*, 1 Burr. 44, *per* Lord Mansfield; *Duck v. Addington*, 4 T. R. 447; *Palmer's Case*, 1 Leach, 393; *McWilliam v. Adams*, 1 Macq. H. L. 176, *per* Lord Truro. [S. P. *Alexander v. Alexandria*, 3 Cranch, 1; *Patterson v. Winn*, 11 Wheat. 380; *The Harriet*, 1 Story, 251; *U. S. v. Collier*, 3 Blatchf. 325; *The Elizabeth*, 1 Paine, 10; *Le Roy v. Chabolla*, 12 Abb. U. S. 448; *Philbrook v. U. S.*, 8 Ct. of Cl. 523; *Smith v. People*, 47 N. Y. 330; *Powers v. Shepard*, 48 N. Y. 540; *Reiford v. Knight*, 15 Barb. (N. Y.) 627; *McCarter v. Orph. Asylum*, 9 Cow. (N. Y.) 437; *Pearce v. Atwood*, 13 Mass. 324; *Green v. Com'th*, 12 Allen (Mass.) 155; *Bruce v. Schuyler*, 9 Ill. 221; *State v. Shaw*, 28 Iowa, 67; *Scott v. Searles*, 9 Miss. 590; *Eskridge v. McGruder*, 45 Id. 294; *State v. Garthwaite*, 23 N. J. L. 143; *Union Canal Co. v. O'Brien*, 4 Rawle (Pa.) 358; *Neeld's Road*, 1 Pa. St. 353; *Black v. Tricker*, 59 Id. 13. 19; *Keeling's Road*, Id. 358; *Mt. Holly Paper Co.'s App.*, 99 Id. 513; *Koontz v. Howsare*, 100 Id. 506; *Linton's App.*, 104 Id. 228; *Jacoby v. Shafer*, 105 Id. 610; *Booz's App.*, 109 Id. 592; *P. A. & M. Pass. Ry. Co.'s App.*, 1 Penny. (Pa.) 449; *Ege v. Com'th*, 20 W. N. C. (Pa.) 73; *Desban v. Pickett*, 16 La. An. 350; *Isham v. Iron Co.*, 19 Vt. 230; *Hayes v. Hanson*, 12 N. H. 284; *Wakefield v. Phelps*, 37 Id. 295; *Dugan v. Gittings*, 3 Md. 54; 3 Gill. 138; *Canal Co. v. R. R. Co.*, 4 Gill & J. (Md.) 1; *Billingslea v. Baldwin*, 23 Md. 85; *State v. Stewart*, 47 Mo. 382; *State v. Clark*, 54 Id. 216; *Dodge v. Gridley*, 10 Ohio St. 173; *Manuel v. Manuel*, 13 Id. 458; *McMahon v. R. R. Co.*, 5 Ind. 413; *State v. Springfield Tp.*, 6 Id. 83; *La Grange v. Cutler*, Id. 354; *Harrison v. Walker*, 1 Ga.

32; *Ezekiel v. Dixon*, 3 Id. 146; *People v. Western*, 3 Neb. 312; *Hendrix v. Reiman*, 6 Id. 516; *State v. Babcock*, 21 Id. 599; *McLaughlin v. Hoover*, 1 Oreg. 31; *Bryan v. Dennis*, 4 Fla. 13; *Mitchell v. Duncan*, 7 Id. 13; *Cannon v. Vaughan*, 12 Tex. 399; *Kollenberger v. People*, 9 Col. 233. The rules that a statute is not to be construed to work public mischief unless plainly required by its language; that effect is to be given to the legislative intention, if ascertainable, though contrary to the letter; that absolute words may be qualified by reference to the context, to prior and subsequent acts in *pari materia*, to the history of the enactment, and to contemporaneous legislation not precisely in *pari materia*; and that acts passed at the same session are to be so construed, if possible, as to give effect to each, apply to, and may control the construction of a clause in an act expressly repealing by title the whole of an earlier act, so that, if upon these grounds of interpretation, an intent is apparent to give the clause a qualified or limited operation, that intent must prevail over the literal and unqualified sense of it. So where the title of an act "to reorganize the local government" of N. Y. related solely to the political organization of a city, indicating no intention to interfere with the organization of its criminal courts, and such appeared from the history of the enactment, and the other elements of construction indicated, to be its proper scope, and the act itself, in all its provisions, strictly adhered to the title, a clause repealing by title another act, which, *inter alia*, prescribed the organization of the criminal courts of the city, was held to leave these provisions in full force: *Smith v. People*, 47 N. Y. 330.]

other part of the common system to which it belongs. [Thus, not only may the entire body of the law upon a subject be given the effect of an harmonious whole, by restraining, enlarging, or qualifying conflicting words in any particular portion of it, by reference to other portions, so as to effectuate the obvious intention of the law ;<sup>63</sup> but where there are irreconcilably conflicting clauses in the same statute, a comparison with other statutes upon the same subject may point out those clauses which are in harmony with such legislation as designed to prevail.<sup>64</sup>]

§ 44. **Illustrations.**—A bye-law which authorized the election of “any person” to be Chamberlain of the City of London would be construed so as to harmonize, and not to conflict, with an earlier one which limited the appointment to person possessed of a certain qualification, and “any person” would be understood to mean only any eligible person (*a*). Where a question arose as to whether the Admiralty Court Act, 24 Vict. c. 10, which gives that court jurisdiction over any claim for “damage” done by any ship, included injuries done to persons by collision ; one reason for deciding in the negative was that in other Acts in *pari materia*, loss of life and personal injury, on the one hand, and loss and damage to ships and other property, on the other, appeared invariably treated distinctly, and the word, “damage” was nowhere, in them, applied to injuries to the person (*b*). So the expression “possession” in the 26th section of the Reform Act of 1832, which enacts that no person shall be registered in respect of his estate or interest in land as a freeholder, unless he has been “in actual possession” of it for six months, was construed in the same sense as in the Statute of Uses, which declares that

<sup>63</sup> See *Noble v. State*, 1 Gr. (Ia.) 325.

<sup>64</sup> *Kansas Pac. Ry. Co. v. Wyandotte Co.*, 16 Kan. 587, if such construction tends to secure most completely the rights of all parties affected, and there is nothing apparent in the act to indicate which provisions the Legislature

regarded as of paramount importance.

(*a*) *Tobacco Pipe Makers v. Woodroffe*, 7 B. & C. 838, overruling *Oxford v. Wildgoose*, 3 Lev. 293.

(*b*) *Smith v. Brown*, L. R. 6 Q. B. 729. But see the judgment of *Baggallay, L. J.*, in *The Franco-nia*, 2 P. D. 174, et seq.

the person who has the use of the land is to be deemed in lawful "possession" of it; and consequently the grantee of a rent-charge by a conveyance operating under the latter statute was held to be in possession of it, within the meaning of the Reform Act, from the date of the execution of the deed (a); though a grantee under a common law conveyance would not be in possession within the same Act, until he had received a payment of the rent-charge (b). [So, again, the various statutes in New York relating to and enlarging the powers of married women, though passed in different years, were held to be construable as one act;<sup>85</sup> and where an act passed in 1817 for the construction of a canal vested the fee of lands taken for that purpose in the people of the state, and lands were taken under a later act, which omitted any provision as to the title, it was held that it vested in the people as under the former law.<sup>86</sup> Where an act, conferring jurisdiction of a certain offense upon a police court, provided that the fine to be imposed should not exceed \$100, nor the imprisonment one year, it was held, upon comparison of other statutes in *pari materia*, that this provision was a limit upon the punishment by either fine or imprisonment, but did not intend to authorize the imposition of both for the same offense.<sup>87</sup> Again, the general road law of Pennsylvania forbade the laying out of a private road on a public road, and required certain notice to be given to parties through whose lands the new road was to pass. A later act authorized the laying out of private roads, under the surface of any land, to coal mines, providing nothing as to the occupation of public roads or notice to parties. It was held that this act was to be construed together with, and as part of, the general road law, and that, therefore, the taking of a public road and the failure to give notice were both fatal defects in a proceeding under the later act,<sup>88</sup> as also the failure, in the petition, for the road,

(a) *Heelis v. Brown*, 18 C. B. N. S. 90, 34 L. J. C. P. 88; *Hadfield's Case*, L. R. 8 C. P. 306.

(b) *Murray v. Thorniley*, 2 C. B. 217; *Orme's Case*, L. R. 8 C. P. 281.

<sup>85</sup> *Perkins v. Perkins*, 62 Barb. (N. Y.) 531.

<sup>86</sup> *Reiford v. Knight*, 15 Barb. (N. Y.) 627.

<sup>87</sup> *Com'th v. Griffin*, 105 Mass. 185.

<sup>88</sup> *Neeld's Road*, 1 Pa. St. 353.

to set forth the definite points where the road was to begin and end, details required by the general road law, but not mentioned in the more recent statute.<sup>90</sup> So, an act enlarging the jurisdiction of Justices of the Peace, and prescribing no forms of procedure, must be construed together with earlier acts upon the same subject and as adopting the forms and practice prescribed by them;<sup>91</sup> and in the construction of an act authorizing married women to dispose of their property by will "executed in the presence of two witnesses," etc., recourse was had to the general wills act for the purpose of ascertaining the meaning of the word "executed," and was accordingly held to prescribe the formality of making a will as regulated by that act, merely with the addition that it should be done in the presence of two witnesses, etc.<sup>92</sup> Similarly the word "sojourner" in the Pennsylvania act of 1881 relating to physicians, in the provision that any person opening an office or appointing any place where he or she may meet patients, or receive calls, shall be deemed a sojourner, was interpreted, by reference to earlier acts, as meaning and applying to one who practiced and had his residence in one county and who had an office and practiced in another, not upon special occasion and at special requests only, but at regular intervals and in pursuance of advertisements.<sup>93</sup> Upon a question, in the construction of a revenue act, whether an exception of "savings institution" from taxation imposed upon "every company or association whatever," relieved Building Associations from the payment thereof, it was decided that it did not, partly, at least, upon the ground that a comparison of other revenue acts demonstrated that such societies were not within the legislative meaning of the term "savings institutions," though they might not unnaturally be embraced therein.<sup>94</sup> On the other hand, by construing an act requiring in general terms bail absolute in appeals by defendants from judgments of Justices of the Peace for wages of manual labor, together

<sup>90</sup> Keeling's Road, 59 Pa. St. 358.

<sup>91</sup> Jacoby v. Shafer, 105 Pa. St. 610.

<sup>92</sup> Linton's App., 104 Pa. St. 228

<sup>93</sup> Ege v. Com'th, 20 W. N. C. (Pa.) 73.

<sup>94</sup> Bourignon B. A. v. Com'th, 98 Pa. St. 54, 64.

with earlier acts regulating the matter of appeals from judgments of justices, it was held that executors and probably others sued in a representative capacity, were not subject to that necessity.<sup>96</sup> Where certain acts requiring certain sums to be paid into the state treasury by a city gave the general court jurisdiction to enforce the payment, and an act was passed requiring an additional payment and thereby increasing the aggregate, but was silent as to the mode of enforcing payment, it was held that the several acts must be construed together and that the remedy given by the earlier was applicable also to enforce the duty prescribed by the latter.<sup>97</sup> Again, where the action of detinue had been regulated by statute, an act directing that certain other issues should be governed by the rules governing issues in actions of detinue, the reference was held to be to the action of detinue as modified by statute, not to the common law action;<sup>98</sup> and the repeal of "section six of" a certain act, which had, after the date of its enactment and before the passage of the repealing act been amended so that a new section stood in the place of the old section six, was construed to be the repeal of section six as amended.<sup>99</sup>

§ 45. **Acts Passed at Same Session.**—[The rule requiring the interpretation of a statute in the light of, and with reference to, others in *pari materia*, has a peculiarly appropriate application to acts upon such kindred subjects passed at the same session of the Legislature.<sup>100</sup> Indeed, in construing a statute, the entire scope of the legislation in *pari materia* of that session should be drawn into consideration.<sup>101</sup> Thus, in 1846, the Legislature of Mississippi, by resolution, authorized payment of a note due to the sinking fund by a certain party, "in the bonds or coupons of the Planter's Bank of Mississippi." At the same session, an act was passed authorizing the com-

<sup>96</sup> *Koontz v. Howsare*, 100 Pa. St. 506.

<sup>97</sup> *Louisville v. Com'th*, 9 Dana (Ky.) 70.

<sup>98</sup> *Gillian v. Moore*, 18 Miss. 180.

<sup>99</sup> *Greer v. State*, 22 Tex. 508.

<sup>100</sup> See *Black v. Scott*, 2 Brock.

325; *Smith v. People*, 47 N. Y. 330; *State v. Rackley*, 2 Blackf. (Ind.) 249. See also *State v. Clark*, 54 Mo. 216.

<sup>101</sup> *Carver v. Smith*, 90 Ind. 222, 227.

missioners to receive, in payment of debts due to the fund, "bonds of the State of Mississippi issued on account of the Planter's Bank and coupons of interest thereon." It was held, that, in view of the statute and the whole legislation upon the subject, the resolution referred to authorized only the receipt of bonds and coupons of the state on account of the bank in payment of the note and not of the bonds and coupons of the bank itself.<sup>101</sup> So the enactment of a criminal code repealing all other laws as to crimes, was construed not to repeal, but to leave standing, side by side with it, a license law with penalties, passed at the same session, the code containing no provisions touching the subject of license.<sup>102</sup> And two acts passed on the same day, relative to the same subject matter, are to be read together, as though they were parts of the same enactment.<sup>103</sup> Hence, where a statute declared all lands held by a seminary free from all taxation whatever, and another statute of the same date enacted that the land on which any seminary is erected, to the extent of five acres, held severally and individually, shall be exempt from taxation, it was held, construing both acts together, that land on which a seminary was erected, owned by the seminary, though exceeding five acres was exempt, whilst, if, not owned by the seminary, only five acres would be exempt.<sup>104</sup> Again, where an act specifically appropriated to the payment of certain outstanding bonds a sum of money granted to the state by congress, and a subsequent act of the same Legislature, out of the same fund, made for a different purpose an appropriation so large that it would have interfered with the payment of the bonds, it was held that the last appropriation should take effect out of what was left of the fund after payment of the bonds.<sup>105</sup>

§ 46. **Appropriation and Revenue Acts, etc.**—[The provisions of appropriation acts, as well as those of any other class of statutes, are to be construed in connection with previous laws

<sup>101</sup> State v. Dickinson, 20 Miss. 579.

<sup>102</sup> Cain v. State, 20 Tex. 355.

<sup>103</sup> People v. Jackson, 30 Cal. 427; Chandler v. Lee, 1 Idaho, N. S. 349.

<sup>104</sup> Naz. Lit. &c. Inst. v. Com'th, 14 B. Mon. (Ky.) 266.

<sup>105</sup> State v. Bishop, 41 Mo. 16. See Riggs v. Brewer, 64 Ala. 282, post, § 215.

relating to the same subject matter;<sup>106</sup> and the principle extends also to rules of courts. Thus, where Rule 11 permitted a plaintiff to take judgment for such part of his claim as the defendant might, in his affidavit of defence, admit, or fail to deny,—Rule 9 having provided that plaintiff should be entitled to judgment for want of an affidavit of defence, “at any time after return day and ten day’s service of the writ,” it was held that the two rules were in *pari materia*, parts of a general system of practice, and to be construed together; and that, therefore, the plaintiff’s right to judgment, even for part of his claim, under Rule 11, could not accrue until expiration of the time allowed defendant for filing an affidavit of defence under Rule 9, his right to the whole of which could not be regarded as waived by the filing of a partial defence at an earlier date;<sup>107</sup> and the rule is said to be particularly applicable to the revenue laws, as forming one system, though composed of independent enactments.<sup>108</sup>

§ 47. *Later Acts in Pari Materia.*—Not only is the later Act construed by the light of the earlier, but it sometimes [where the meaning which the Legislature attached to the words of the earlier enactment can be gathered from a later statute in *pari materia*,<sup>109</sup>] furnishes a legislative interpretation of the earlier.<sup>110</sup> Thus chapter 23 of Magna Charta, which provides that “all weirs shall be put down through Thames and Medway, and through all England, except by the sea-coast,” was held to apply only to navigable rivers, because the 25 Ed. 3 and other subsequent statutes spoke of it as having been passed to prevent obstruction to navigation (*a*). To determine the meaning of the word “broker,” in the 6 Anne, c. 16, the Bubble Act (6 Geo. 1, c. 18), passed twelve years later, was referred to, where the same term was used (*b*). In section 299 of the Merchant Shipping Act of 1854,

<sup>106</sup> *Converse v. U. S.*, 21 How. 463. And see *Riggs v. Pfister*, 21 Ala. 469; *Riggs v. Brewer*, 64 Id. 282, post, § 215.

<sup>107</sup> *Boyle v. Horner*, 104 Pa. St. 379.

<sup>108</sup> *U. S. v. Collier*, 3 Blatchf. 325.

<sup>109</sup> *U. S. v. Freeman*, 3 How. 56.

<sup>110</sup> *Ibid.* See also *Georgia Pen-*

*it’y Co. v. Nelms*, 65 Ga. 67, as to effect of resolution of 1879 upon the construction of the act of 1876, relating to the lease of convicts.

(*a*) 25 Ed. 3, stat. 4, c. 4; *Rolle v. Whyte*, L. R. 3 Q. B. 286; *Callis on Sewers*, 258.

(*b*) *Clarke v. Powell*, 4 B. & Ad. 846; *Smith v. Lindo*, 4 C. B. N. S. 395, 27 L. J. C. P. 196, 335.



which enacts that damage arising from non-observance of the sailing rules shall be *primâ facie* deemed to have been occasioned by "the wilful default" of the person in charge of the deck, the expression "wilful default" was construed by the light of the later Shipping Act of 1862, the 24th section of which declares that the ship which occasioned the collision shall be deemed to be "in fault," as including a negligent as well as a criminal default (*a*). [So, where an act, passed in 1865, forbade discrimination on account of color or race, in any licensed inn, in any public place of amusement, etc.; and another passed in 1866, forbade the exclusion of persons from any public places of amusement, "licensed under the laws of" the commonwealth, it was held, upon comparison of the two acts, that the public places of amusement referred to in the earlier must be construed to mean such as were licensed under the laws of the commonwealth.<sup>111</sup> In other words, the understanding of the phrase in the earlier act was dictated by the explicit language of the later. Similarly, acts have been construed as not repealing others by implication, by reference to the fact of a subsequent express repeal thereof by still another act;<sup>112</sup> and the passage of an act in 1851 authorizing securities from husband to wife to be taken in the name of a third person as trustee and declaring securities theretofore taken directly by the wife from her husband valid, was invoked as showing a legislative construction of the Pennsylvania married woman's act of 1848 to the effect that it was not intended to sanction such direct dealings between husband and wife.<sup>113</sup>]

General rules and forms made under the authority of an Act which enacted that they should have the same force as if they had been included in it have also been referred to for the purpose of assisting in the interpretation of the Act (*b*).

§ 48. **Expired and Repealed Acts in Pari Materia.**—The language and provisions of expired and repealed Acts on the

(*a*) *Grill v. The Screw Collier Co.*, L. R. 1 C. P. 611, *per* Willes, J.

<sup>111</sup> *Com'th v. Sylvester*, 13 Allen (Mass.) 247.

<sup>112</sup> See *Cape Girardeau Co. Ct. v. Hill*, 118 U. S. 68; *Moyer v.*

*Gross*, 2 Penn. & W. (Pa.) 171.

<sup>113</sup> *Bear's Administrator v. Bear*, 33 Pa. St. 525, 530. But see post, § 53, and compare post, §§ 365, 366.

(*b*) *Re Andrew*, 1 Ch. D. 358.

same subject and the construction which they have authoritatively received are also to be taken into consideration [in the construction of a statute, as parts of the general system, or possibly more properly as instructive steps in the development of the existing system, of legislation upon the point in question.<sup>114</sup>] Thus, 202nd section of the Bankrupt Act of 1849, which makes "void" all securities given by a bankrupt to a creditor to induce the latter to forbear opposition to the bankrupt's certificate, was construed in the same sense as that which had been given to the same provision in the earlier and repealed Bankrupt Act of the 6 Geo. 4 (*a*). What was meant in the Vagrant Act, 5 Geo. 4, c. 8, by "running away, leaving his or her child chargeable to the parish," was determined by referring to the earlier Act of 5 Geo. 1, which spoke of persons who "run or go away from their abodes into other counties or places, and sometimes out of the kingdom," and was therefore held not to apply to a woman who left her children at the door of the workhouse, and returned to her usual abode in the town, where the workhouse was situated (*b*). [And ch. 74, § 3, of the Revised Statutes of Massachusetts, forbidding the bringing of an action to charge a party on his representation concerning the character, etc., of another, unless such representation was in writing, was held to apply, like the repealed act of 1834, c. 182, § 5, only to representations affecting the credit of another.<sup>115</sup> So, the definitions of a word given by a former act in *pari materia*, which has been repealed, may be properly consulted.<sup>116</sup>]

<sup>114</sup> See *Medbury v. Watson*, 6 Metc. (Mass.) 246; *Daniels v. Com'th*, 7 Pa. St. 371, 373, cit. *Church v. Crocker*, 3 Mass. 17, 21; *Holbrook v. Holbrook*, 1 Pick. (Mass.) 254. See also *Ford v. Burch*, 6 Barb. (N. Y.) 60; *Thayer v. Dudley*, 3 Mass. 296; *Holland v. Makepeace*, 8 Id. 418, 423; *Mendon v. Worcester*, 10 Pick. (Mass.) 235; *Coffin v. Rich*, 45 Me. 507; *Henry v. Tilson*, 17 Vt. 479; *Coleman v. Davidson Academy*, *Cooke*, (Tenn.) 253; *Forqueran v. Donnally*, 7 W. Va. 114.

(*a*) *Goldsmid v. Hampton*, 5 C. B. N. S. 94, 27 L. J. C. P. 286;

see also *Exp. Copeland*, 2 De G., M. & G. 914, 22 L. J. Bcy. 17.

(*b*) *Cambridge Union v. Parr*, 10 C. B. N. S. 991, 30 L. J. M. C. 241, *per* Byles, J.

<sup>115</sup> *Medbury v. Watson*, 6 Metc. (Mass.) 246. But, of course, the repealed act, though re-enacted with some changes, whilst it may be so considered in construing the repealing act, is itself of no operative force whatever except in so far as it is continued in force by saving clauses and exceptions: *Coffin v. Rich*, 45 Me. 507.

<sup>116</sup> *Exp. Crow Dog*, 109 U S 556.

§ 49. **Repealed Portions of Acts.**—[In the same manner,] where a part of an Act has been repealed, it must, although of no operative force, still be taken into consideration in construing the rest. If, for instance, an Act which imposed a duty on racehorses, cabhorses, and all other horses were repealed as regards racehorses, the remaining words would still obviously include them, if the enactment were read as if the repealed words had never formed a part of it (a). Where a statute imposed a duty on artificial mineral waters [and all waters impregnated with carbonic acid gas] and on all other waters to be used as medicines, and the duty on artificial mineral waters was afterwards repealed, the repealed words were held essential for determining whether what still subsisted of the Act, though wide enough to include artificial waters, was intended to include them (b). [So, in construing a section of an act remaining in force, resort may be had to a proviso to it which has been repealed.<sup>117</sup>

§ 50. **Repealed, etc., Acts Expressly Referred to.**—[Whilst the propriety of comparing expired or repealed statutes, or parts of statutes, with those remaining in force, for the purpose of construing the latter, is unquestionable, in the absence of any reference to them in the statute under construction,<sup>118</sup>

(a) *Per* Bramwell, L. J., in *Atty.-Gen. v. Lamplough*, 3 Ex. D. 214, 47 L. J. 555.

(b) *Ibid.* [It was held reversing the lower court that the water taxable under the first head, did not, upon the repeal of that item, become taxable under the more general clause. See the opinion of Kelly, C. B., the dissentient judge in the lower court, at p. 223: "No judge ever laid down as law that, where a particular clause in an Act of Parliament is repealed, the whole Act must be read as if that clause had never been enacted. All that can be said is that the clause is to be taken as if it had never been enacted." But where an act provided that *no person* should sell *wine*, brandy, rum or other spirituous liquors in quantities less than 28 gallons, without license, under a penalty of \$20 for each offence; and a later act provided that no inn holder, retailer,

common victualler, or other person should sell any brandy, rum or other spirituous liquor in a less quantity than 15 gallons under a penalty of not more than \$20 nor less than \$10, and repealed all acts then in force inconsistent with it, it was held that there was no inconsistency between the acts as to the seller and the kind and quantity of liquors with reference to one who was neither an inn holder nor a common victualler convicted under the first act of selling spirituous liquor, but an inconsistency as to the penalty, and that, therefore, he could not be sentenced: *Com'th v. Kimball*, 21 Pick. (Mass.) 373. See post, §§ 236, 239.]

<sup>117</sup> *Bank for Savings v. Collector*, 3 Wall. 495; *Exp. Crow Dog*, 109 U. S. 556.

<sup>118</sup> See *Forqueran v. Donnally*, 7 W. Va. 114. Nor can a proviso which is void, because unconstitu-

the propriety of such comparison is still more obvious where there is an express reference, in the statute in force, to the repealed statute. It is said, that, where an act superseding a former one refers to the latter, the superseding statute must be construed with reference to the superseded one.<sup>119</sup> And notwithstanding the repeal of Wis. Rev. St. 1878, § 1210a, the words of § 1210b, "any of the causes mentioned in § 1210a," etc., were, it was held, to be understood as if the enumeration of causes thus referred to were incorporated in § 1210b, and § 1210a, though repealed, was to be looked at to ascertain what they were.<sup>120</sup>

§ 51. **Revisions—Codifications—Re-enactments.**—[The rule which permits a resort to repealed and superseded statutes, in *pari materia*, is of great importance in the construction of statutes which re-enact, with changes, and repeal former ones, and in that of enactments containing revisions or codifications of earlier laws. As to the former, it is obvious that a change of language is some indication of a change of intention. Thus, where] a repealed Act imposed a penalty on the owner of cattle found lying on the highway "without a keeper," and the same provision was re-enacted without the last words, the omission was construed as obviously showing the intention that the presence of a keeper should no longer absolve the owner from liability (*a*). [And so, where the latter of two acts upon limited partnerships failed to prescribe a penalty for a certain omission, for which the first act had provided a penalty, the court said: "The omission to prescribe a penalty . . . is good reason for concluding that no such liability was intended."<sup>121</sup> As to codifications and revisions, which, upon a principle that will hereafter become manifest, are held, in general, to repeal the enactments covered by their provisions,<sup>122</sup> it is, no doubt,

tional, be disregarded in the interpretation of the section to which it is appended: *Com'th v. Potts*, 79 Pa. St. 164.

<sup>119</sup> *Ham v. Boston B'd of Police*, 142 Mass. 90; and hence it was held that the act of 1885, giving the board power to remove for cause, required notice and hearing before removal: *ibid.* See also, on this question of power, *Andrews v.*

*King*, 77 Me. 224.

<sup>120</sup> *Flanders v. Merrimack*, 48 Wis. 567.

(*a*) 27 & 28 Vict. c. 101, s. 25; *Lawrence v. King*, L. R. 3 Q. B. 345; see also *R. v. Moah*, *Dearsl.* 626; *Exp. Gorely*, 34 L. J. Bcy. 1.

<sup>121</sup> *Eliot v. Himrod*, 108 Pa. St. 569, 573. But see as to the limit of this rule, post, §§ 378-381.

<sup>122</sup> See post, §§ 301, 202.

true, that, like the Revised Statutes of the United States, they must be accepted as the law upon the subject they embrace, as it existed when the Revision or Code went into force, and that, consequently, when their meaning is plain the Court cannot recur to the original statute to see if errors were committed in revising them.<sup>123</sup> Yet it has been conceded that, where, in construing the language of a code or a revision of statutes, there is a substantial doubt as to its meaning, the original statute may be looked at and considered.<sup>124</sup> And more especially is this the case, where the act authorizing the codification requires marginal references to the sessions acts.<sup>125</sup>]

§ 52. *Acts upon Similar Subjects.*—The construction which has been put upon Acts on similar subjects, even though the language should be different, should for a similar reason be referred to.<sup>126</sup> Thus, the Insolvent Act, 1 & 2 Vict. c. 110, s. 37, which vested in the provisional assignee all the insolvent's debts which became due to him before his discharge, received the same construction as a similar provision in the Bankrupt Act of 6 Geo. 4 (*a*). The provision of the 9 Geo. 4, c. 14, requiring that an acknowledgment to take a debt out of the Statute of Limitations should be signed "by the party chargeable thereby," was held not to include an acknowledgment by his agent, on the ground that when the Legislature intended to include the signature of agents, not only in other Statutes of Limitations, but also in several sections of the Statute of Frauds, one of which was recited in the Act, express words had been used for the purpose (*b*). So the County Court Act of 1867, which gives jurisdiction in ejectment when the value of the tenement does not exceed twenty pounds, was construed, as regards the measure of value, by reference to the Parlia-

<sup>123</sup> U. S. v. Bowen, 100 U. S. 508; Arthur v. Dodge, 101 Id. 34; Victor v. Arthur, 104 Id. 498.

<sup>124</sup> Myer v. West. Car Co., 102 U. S. 1; Pratt v. Boston Street Comm'rs, 139 Mass. 559.

<sup>125</sup> Nicholson v. Mobile, &c. R. R. Co., 49 Ala. 205; where it was held, that, in case of conflict

between two sections, the original statute governs.

<sup>126</sup> See Whitcomb v. Rood, 20 Vt. 49; Smith v. People, 47 N. Y. 330.

(*a*) Jackson v. Burnham, 8 Ex. 173, 22 L. J. Ex. 63; Herbert v. Sayer, 5 Q. B. 965.

(*b*) Hyde v. Johnson, 2 Bing. N. C. 776.

mentary Assessment Act (a). That which was held a sufficient signature to a will or contract under the Statute of Frauds (b) was held sufficient under the Bankrupt Act, 6 Geo. 4, c. 16, s. 131 (c), under the Statute of Limitations (d), and under the Registration of Voters Act (e). [So, upon the ground that statutes having similar objects are to be construed alike, the same principles that apply to the construction of bankruptcy laws were held to govern in the case of a statute to prevent frauds by incorporated companies, the statute having in view a similar object, namely, an equal distribution of assets among creditors.<sup>127</sup> And where, under an act allowing an execution debtor to claim a certain exemption, it had been held that the claim must be made so as to cause no delay and before expense had been incurred, this construction was applied also to subsequent acts allowing a widow to claim certain property out of her husband's estate,<sup>128</sup> and an assignor to retain a certain amount of property,<sup>129</sup> none of the acts fixing any time within which the rights conferred by them should be exercised, but all having a similar purpose and effect.

§ 53. **Purpose, Effect, Basis and Limits of this Rule.**—[The purpose of the rule of construction, under discussion, is, of course, like that of every other, to elucidate the meaning of a given statute. Its method is to ascertain the meaning of any particular phrase or provision in the light of every direction made upon the subject matter it refers to by the Legislature up to the time when the court is called upon to pronounce its judgment. It requires particular phrases, left doubtful by the act itself, to be construed as synonymous with, or analogous to, the same phrases used in other statutes upon the same subject in such connections or surroundings as define their meaning beyond question, or point emphati-

(a) 31 & 32 Vict. c. 142, s. 11; *Elston v. Rose*, L. R. 4 Q. B. 4.

(b) *Lemane v. Stanley*, 3 Lev. 1; *Knight v. Crockford*, 1 Exp. 190; *Herbert v. Treherne*, 3 M. & Gr. 343.

(c) *Ogilvy v. Foljambe*, 3 Mer. 53; *Kirkpatrick v. Tattersall*, 13 M. & W. 766.

(d) *Lobb v. Stanley*, 5 Q. B. 574, *per* Patterson, J.

(e) 6 & 7 Vict. c. 18, s. 17; *Bennett v. Brunfitt*, L. R. 3 C. P. 28.

<sup>127</sup> *Receivers of People's B'k v. Paterson Sav. B'k*, 10 N. J. Eq. 13.

<sup>128</sup> *Davis' App.*, 34 Pa. St. 256.

<sup>129</sup> *Chilcoat's App.*, 101 Id. 26.

cally to a certain interpretation. It requires gaps left in the act, not amounting to *casus omissi*, to be filled from the materials supplied by other statutes upon the same subject and in harmony with them. It requires words capable of several meanings, the choice among which is not determined by the use of words in a definite and unmistakable sense in one of the other statutes, to be so construed, if possible, as to preserve in force and effect, side by side with them, the words of earlier statutes, to the avoidance of an interpretation which would raise a repugnancy between the earlier and the later statutes, fatal to the order. The effect is to preserve harmony and consistency in the entire body of the legislation upon a given subject matter. That this result must be in consonance with the intention of the Legislature, and that the methods enforced by this rule to ascertain the same are effectual for the purpose, is manifest from the obvious considerations lying at the bottom of the rule itself: that the Legislature is not ignorant of the previous course of legislation upon a subject it undertakes to legislate upon;<sup>130</sup> and that, when dealing, at different times, with the same subject, it may be supposed to use the same words in the same sense.<sup>131</sup> The statement of the rule, however, as flowing from these propositions, carries with it its own limitation. It is clear, that, where the statute under construction, taken by itself, viewed in the light of the objects it is intended to attain and applied to the subject matter it effects, evinces a design to depart from the general and previously existing system of legislation thereon, or to use words in a sense different from that in which they are used in other acts on the same subject, this intention cannot be defeated, and the rule, therefore, is, in such case, inapplicable.<sup>132</sup> In other words, where the language of the statute is plain and explicit, it cannot be controlled by the rule in *pari materia*.<sup>133</sup> Nor can that rule be properly resorted to where the construction of the words of an act in their ordinary sense would not inter-

<sup>130</sup> Howard Ass'n's App., 70 Pa. St. 344, 346.

<sup>131</sup> Robbins v. R. R. Co., 32 Cal. 472; County Seat of Linn Co., 15 Kan. 500.

<sup>132</sup> See County Seat of Linn Co., 15 Kan. 500.

<sup>133</sup> See Exp. Blaiberg, in re Toomer, L. R. 23 Ch. D. 258, per Jessel, M. R.

fere with other enactments in *pari materi*; <sup>134</sup> and even where they do, though the construction under this rule may attribute to them a sense which is not their ordinary sense, the sense imposed upon them must be one in which they are "reasonably capable of being read."<sup>135</sup> Nor does the rule ever go to the extent of controlling the language of a statute by the supposed policy of previous enactments.<sup>136</sup> And so far as the influence of subsequent legislation upon the construction of an earlier act in *pari materia* is concerned, it must be remembered that it is the intent of the Legislature that enacted a statute which is to govern the courts in its construction,<sup>137</sup> and that, therefore, in general, the opinion of a subsequent Legislature upon the meaning of an act passed by a former one is of no more weight than that of the same men in a private capacity;<sup>138</sup> and consequently mere inferences from the language of an act passed by a subsequent Legislature cannot properly interfere with the construction of a statute according to its plain import.<sup>139</sup>

§ 54. *Acts not in Pari Materia.*—But where Acts are not in *pari materia*, [*i. e.*, where they do not form an united system and cannot be regarded as such,<sup>140</sup>] it is fallacious to take the construction which has been put upon one as a guide to the construction of another (*a*). [The meaning which one legislative body attaches to its use of a term in an act passed by it, cannot be conclusive as to the meaning in which another legislative body employs the same term in a different act.<sup>141</sup>] For instance, the meaning put on the word "goods"

<sup>134</sup> See *R. v. Tonbridge Overseers*, L. R. 13 Q. B. D. 342, per Brett, M. R.

<sup>135</sup> See *Ibid.*

<sup>136</sup> *Goodrich v. Russel*, 42 N. Y. 177. But it has been said that even an English statute declaring the law upon a matter of doubt at common law, though of no authority as such in this country, may, as strictly a declaratory law, be entitled to weight: *Bull v. Loveland*, 10 Pick. (Mass.) 9, 13.

<sup>137</sup> See post, §§ 365-368.

<sup>138</sup> *Bingham v. Supervisors of Winona*, 8 Minn. 441.

<sup>139</sup> *Ingalls v. Cole*, 47 Me. 530.

<sup>140</sup> See *United Soc'y v. Eagle Bank*, 7 Conn. 457, 469.

(*a*) *Dewhurst v. Fielden*, 7 M. & Gr. 187, per Maule, J.; *Eyre v. Waller*, 5 H. & N. 460, 29 L. J. 247, per Wilde, B.

<sup>141</sup> *Feagin v. Comptroller*, 42 Ala. 516, where an act increasing the sheriff's "fees" was held not to increase his "fees" for victualling prisoners, other acts showing, that, though the act designating the amount to be allowed him for that purpose, spoke of it as "fees," it was not to be regarded as strictly such in the legislative sense of the word, but as "allowances" or



in the reputed ownership clause of the Bankrupt Acts would be no guide to its meaning in the 17th section of the Statute of Frauds, not only because the words associated with it are different, but because the objects of the Act are wholly different (*a*). For the same reason, the Parochial Assessment Act, 6 & 7 Will. 4, c. 96, was held to throw no light on the meaning of "the clear yearly value" of a tenement which qualified a voter upon the Reform Act of 1832 (*b*). Because Chambers are "a house" for the purpose of assessment to a poor rate under the 43 Eliz. c. 2 (*c*), of gaining a settlement under the 6 Geo. 4, c. 57 (*d*), of qualifying for a vote under the Reform Act of 1832 (*e*), and also as a place in which a burglary might be committed (*f*), it did not follow that the same meaning was to be given to the expression in the 48 Geo. 3, c. 55, which imposed a duty on "inhabited houses" (*g*). A bicycle, which is a "carriage" within an enactment against furious driving, would not necessarily be also a carriage under a turnpike Act which imposed a toll on carriages impelled by steam or other agency (*h*).

§ 55. **Private Acts and Special Clauses.**—It may be added that in construing Acts of a private or local character, such as railway Acts, the Courts do not shut their eyes to the fact that special clauses, frequently found embodied in them, are in effect, private arrangements between the promoters and particular persons,<sup>142</sup> and are not inserted by the Legislature as part of a general scheme of legislation, but are

"accounts." And see *Spencer v. Metrop. B'd of Works*, L. R. 22 Ch. D. 157.

(*a*) *Humble v. Mitchell*, 11 A. & E. 205.

(*b*) 2 Wm. 4, c. 45, s. 27; *Colvill v. Wood*, 2 C. B. 210.

(*c*) *R. v. St. George's Union*, L. R. 7 Q. B. 90.

(*d*) *R. v. Ushworth*, 5 A. & E. 261.

(*e*) *Henrette v. Booth*, 15 C. B. N. S. 50, 33 L. J. 6.

(*f*) *Evans' Case*, Cro. Car. 473.

(*g*) *Atty-Gen. v. Westminster Chambers Assoc.*, 1 Ex. D. 469.

See also *R. v. Oxford* (V. C.), L. R. 7 Q. B. 471.

(*h*) *Williams v. Ellis*, 5 Q. B. D. 175.

<sup>142</sup> So it has been held that the rule that words are to be taken in the strongest sense against the party using them, does not apply to a contract by the State in granting a charter, the promoters, rather than the Legislature, being regarded as the framers of the language: *Raleigh, &c. R. R. Co. v. Reid*, 64 N. C. 155; *Wilmington, &c. R. R. Co. v. Reid*, Id. 226; *McAden v. Jenkins*, Id. 796.

simply introduced at the request of the parties concerned. If the general provisions of such Acts were to override such special clauses, those in whose favor the latter are inserted would have a just claim to be heard in Committee on every clause of the Act, which would make it impossible to conduct any private legislation (a). Such special clauses are therefore treated as isolated, and foreign to the rest of the Act; so that their wording, contrary to the general rule, is not to be regarded as throwing any light on the construction of it (b).

[Nor, in the exposition of private statutes conferring special privileges, or imposing particular obligations, would it be proper to resort to the language of any other private act not relating to the same parties and subject matter; such statutes standing on the same basis with contracts by deed, not generally affected by evidence aliunde.<sup>143</sup> "Private acts of the Legislature, conferring distinct rights on different individuals, which never can be considered as being one statute, or the parts of a general system, are not to be interpreted by a mutual reference to each other. As well might a contract between two persons be construed by the terms of another contract between different persons."<sup>144</sup> Accordingly it was held that the charters of various different banks could not be regarded as in *pari materia*, nor construed with reference to each other.<sup>145</sup> And though two corporations, boom companies, separately chartered by the Legislature, subsequently became consolidated, by virtue of an act of assembly which conferred upon the consolidated company all the rights, privileges and immunities, and made it subject to all the restrictions, contained in the acts incorporating each company; it was held that the charters must be separately interpreted, so that, as before the consolidation, each company was required to deliver the logs at its own boom, the liability of the consolidated company to

(a) *Per* Jessel, M. R., in *Taylor v. Oldham*, 4 Ch. D. 410.

(b) *Per* Lord Cairns in *East London R. Co. v. Whitechurch*, L. R. 7 H. L. 89.

<sup>143</sup> *Thomas v. Mahan*, 4 Me. 513.

<sup>144</sup> *United Soc'y v. Eagle B'k*, 7 Conn. 457, 469.

<sup>145</sup> *Ibid.*

deliver the logs at the boom in which they were caught, remained unchanged.<sup>146</sup>

§ 56. **Special and General Acts read together.**—[But it is obvious that statutes granting such special privileges are, in one sense, to be read together and construed in conformity with general statutes laying down universal rules applicable to the class of corporations to which the one claiming under the special act belongs. Thus it has been held in Pennsylvania that railroad companies incorporated by or under special acts, are subject to the regulation of the general railroad law of February 19, 1849, except in so far as such regulations are specially altered by the special acts, or are so inconsistent therewith as to evince a design to supersede them.<sup>147</sup> And similarly it has been held in New Jersey, that a reservation by general law of a right to the state to alter charters granted by it will be read inserted in each new charter, even though no reference to it be made therein.<sup>148</sup> So, too, it has been held, that, where a corporation claims a right not expressly given by its charter, upon the ground of construction, the passage of an act by the Legislature subsequently to the charter inconsistent with such right, requires that the charter be given such construction as not to raise a conflict between it and the statute, unless a contrary interpretation is demanded by the general scope and evident design of all the pertinent provisions in the charter.<sup>149</sup>

§ 57. **Constitutional Provisions in Pari Materia.**—[It has occasionally been said that a statute and a constitutional provision in *pari materia* must be construed together.<sup>150</sup> This requisite stands upon a somewhat different ground from

<sup>146</sup> Gould v. Langdon, 43 Pa. St. 365. Compare, however, Levering v. R. R. Co., 8 Watts. & Serg. (Pa.) 459, where charters of various railroad companies were compared for the purpose of construing a certain provision in that of the defendant corporation.

<sup>147</sup> Mt. Holly Paper Co.'s App., 99 Pa. St. 513. See also New Brighton R. R. Co.'s App. 105 Id. 13.

<sup>148</sup> State v. Comm'rs of R. R. Tax'n, 37 N. J. L. 228.

<sup>149</sup> Maysville Turnp. Co. v. How, 14 B. Mon. (Ky.) 426. See for another instance of reading together a special and general act so as to avoid a repeal of the latter: Comm'rs of Excise v. Burtis (N. Y.) 4 Centr. Rep. 235.

<sup>150</sup> See Billingsley v. State, 14 Md. 369. And see also Aultman's App., 98 Pa. St. 505.

that of the rule above discussed, and seems more properly referable to the presumption that all legislation is intended to conform with the constitution, a proposition which will be hereafter discussed.<sup>181</sup>]

<sup>181</sup> See post § 181.

## CHAPTER III.

## TITLE, MARGINAL NOTES, PUNCTUATION, PREAMBLE, SCHEDULE, ETC.

- § 58. Title.
- § 59. Effect of Constitutional Requirements as to Title.
- § 60. Marginal notes.
- § 61. Punctuation.
- § 62. Preamble.
- § 67. Matters Similar to Preamble. Recital.
- § 68. Reports of Committees. Petitions. Maps.
- § 69. Chapter, Section, etc., Headings.
- § 71. Schedule.
- § 72. Resumé.

§ 58. **Title.**—It has long been established [in England] by numerous judicial decisions or dicta, from Lord Coke's to the present time, that [the title of a statute] is not a part of the statute, and is to be therefore, excluded from consideration in construing the statute. "The title cannot be resorted to," says Lord Cottenham, "in construing the enactment." (a) "The title, though it has occasionally been referred to as aiding in the construction of an act, is certainly no part of the law," it is said by the Court of Exchequer, in a well-known and considered judgment, "and, in strictness ought not to be taken into consideration at all" (b). And Lord

(a) *Hunter v. Nockolds*, 1 McN. & Gord. 651.

(b) *Per Cur.* in *Salkeld v. Johnson*, 2 Ex. 283, citing Lord Coke in *Powtler's Case*, 11 Rep. 336: ["As to the style or title of the act, that is no parcel of the act, and ancient statutes were without any title, and many acts are of greater extent than the titles are."] Lord Holt in *Mills v. Wilkins*, 6 Mod. 62; Lord Hardwicke in *Atty.-Genl. v. Weymouth*, Ambler 22: ["The title is no part of the act, and has often been determined not to be so, nor ought it to be

taken into consideration in the construction of an act, for originally there were no titles to the acts, but only a petition and the King's answer; and the judges thereupon drew up the act into form and then added the title; and the title does not pass the same forms as the rest of the act, only the Speaker, after the act is passed, mentions the title and puts the question upon it; therefore the meaning of the act is not to be inferred from the title."] Lord Mansfield in *R. v. Williams*, 1 W. Bl. 95. See also *Chance v. Adams*,

Denman remarked that the Court had often laid that down (a). [In this country, whilst the title of a statute is not, in general, regarded as a part of the same,<sup>1</sup> it is nevertheless regarded as a legitimate aid in ascertaining the intention of the Legislature when the language and provisions in the body of the act are ambiguous and of doubtful meaning and application ;<sup>2</sup> as, for example, where a statute purported, in its body, to correct schedule M of section 25 of the Revised Statutes of the United States, and section 25 had no schedule M, a reference to the title, an act to "correct an error in section 2504 of the Revised Statutes," etc., was held permissible to explain and rectify an obvious error.<sup>3</sup>

§ 59. **Effect of Constitutional Requirements as to Title.**—[The propriety of such reference is especially manifest where the title is referred to in the body of the act,<sup>4</sup> and all the more justifiable, in cases of uncertainty, where the constitution

1 Lord Raym. 77; and *per* Byles, J., in *Shrewsbury v. Scott*, 6 C. B. N. S. 1, 29 L. J. C. P. 34; *per* Lord St. Leonards, in *Jeffreys v. Boosoy*, 4 H. L. 982, 24 L. J. Ex. 109; *per* Grove, J., in *Morant v. Taylor*, 1 Ex. D. 194; and the American Case, *Hadden v. The Collector*, 5 Wallace, 110.

(a) *R. v. Wilcock*, 7 Q. B. 329. The rule has not, indeed, been invariably observed. See *ex. gr.* *R. v. Wright*, 1 A. & E. 446; *Alexander v. Newman*, 2 C. B. 141; *Taylor v. Newman*, 4 Best. & S. 93; 32 L. J. 189; *Rawley v. Rawley*, 1 Q. B. D. 466; *Bentley v. Rotheram*, 4 Ch. D. 588; for the mind, when laboring to discover the design of the Legislature, naturally seizes on everything from which aid can be derived. *Per* Cur. in *U. S. v. Fisher*, 2 Cranch, 386; *U. S. v. Palmer*, 3 Wheat. 631. [See *People v. Shoonmaker*, 63 Barb. (N. Y.) 49.] It has even been occasionally asserted that its title was part of a Statute, and was not to be disregarded in construing it. See *Brett v. Brett*, 3 Addams, Ec. 217; *Hinton v. Diben*, 2 Q. B. 663, *per* Cur.: *Wilmot*

*v. Rose*, 3 E. & B. 576, 23 L. J. 281, *per* Lord Campbell; *Free v. Burgoyne*, 2 Bligh N. S. 78; *Blake v. Midland R.*, 18 Q. B. 109; *Johnson v. Upham*, 2 E. & E. 263; *Allkins v. Jupe*, 2 C. P. D. 383; and *Coomber v. Berks*, 9 Q. B. D. 26. But it does not seem that on those occasions, attention was directed to the established rule.

<sup>1</sup> See *Ogden v. Strong*, 2 Paine, 584; *Plummer v. People*, 74 Ill. 361; *Com'th v. Slifer*, 53 Pa. St. 71; *McFate's App.*, 105 Id. 323, 326; *Cohen v. Barrett*, 5 Cal. 195; *Bradford v. Jones*, 1 Md. 351; *Burgett v. Burgett*, 1 Ohio, 469; *Garrigus v. Com'rs*, 39 Ind. 66; *State v. Stephenson*, 2 Bailey (S. C.) 334; *State v. Welsh*, 3 Hawks (N. C.) 404; *Eastman v. McAlpin*, 1 Ga. 157; and see cases in succeeding notes.

<sup>2</sup> See *U. S. v. Palmer*, 3 Wheat. 610; *Hines v. R. R. Co.*, 95 N. C. 434; and see cases in preceding note.

<sup>3</sup> *Wilson v. Spaulding*, 19 Fed. Rep. 304.

<sup>4</sup> *Torreyson v. Examiner*, 7 Nev. 19.

gives significance and assigns particular importance to the title by requiring that a statute shall contain but one subject, and that it shall be expressed in the title.<sup>5</sup> It is indeed said, that, under a constitutional prohibition against more than one subject in any statute and a requirement of its clear expression in the title, the latter necessarily becomes a part of the statute,<sup>6</sup> "and aids, if need be, in its construction,"<sup>7</sup> as "a very important guide to its right construction."<sup>8</sup> But, unless the constitution imperatively prescribes a different relation between the title and the body of the act, the rule remains that the former may be consulted in aid of the interpretation of the latter, only in cases of ambiguity and uncertainty in its provisions,<sup>9</sup> in aid "if need be"<sup>10</sup> of their construction. It can never control the plain and unambiguous meaning of the language of the statute,<sup>11</sup> nor be used to extend or restrain its positive provisions;<sup>12</sup> so that, even in the interpretation of a penal law, if the words of the enacting clause are broader than the title, the former must govern.<sup>13</sup> This rule, however, under constitutions containing a provision such as above indicated, is subject to an apparent exception. The subject matter being required to be expressed in the title, if the language of the act were broader than the fair meaning of the words of the title, but could be, reasonably and without doing positive violence to the letter, so construed as to bring it within the title, thus avoiding the failure of the entire statute or some of its provisions as unconstitutional, it probably would, upon a principle to be hereafter examined,<sup>14</sup> be so construed. In that way it may in a certain sense, become practically true, that, under such a constitutional provision, the title may control the statute or

<sup>5</sup> *Meyer v. West. Car Co.*, 102 U. S. 1.

<sup>6</sup> *Pa. R. R. Co. v. Riblet*, 66 Pa. St. 164; *Eby's App.*, 70 Id. 311; *Halderman's App.*, 104 Id. 251.

<sup>7</sup> *Ibid.*, at p. 259.

<sup>8</sup> *Eby's App.*, supra, at p. 314.

<sup>9</sup> *Re Boston Min., etc., Co.*, 51 Cal. 624.

<sup>10</sup> *Halderman's App.*, ubi supra.

<sup>11</sup> *Re Boston, etc. Co.*, supra; *U. S. v. Fisher*, 2 Cranch, 386.

<sup>12</sup> *Hadden v. Collector*, 5 Wall. 107; *Flynn v. Abbott*, 16 Cal. 358; *State v. Cazeau*, 8 La. An. 114.

<sup>13</sup> *U. S. v. Briggs*, 9 How. 351; and see *S. P.* as to a statute not penal: *Com'th v. Slifer*, 53 Cal. St. 71.

<sup>14</sup> See post, §§ 178, 180.

some portion of it;" *i. e.*, it may narrow it. Where, however, the title is so defective as to render the act void, it would seem to be scarcely accurate to say that the title controls the statute or its construction; and so, where a portion of the statute consisting of a second subject, not expressed in the title, should have to be rejected as unconstitutional. In such cases, in the first the whole statute, in the second that portion not covered by the title, would simply be void; and could never, therefore, become, properly speaking, the subject of judicial construction.<sup>16</sup> But, there being no difficulty as to the sufficiency of the title to comprehend the subject matter of a statute, it is said, that, whilst the title alone is not to be regarded as a safe expositor of the law, it may be presumed, in the absence of plain contradiction by the terms of the body of the act, to express its true intent and meaning.<sup>17</sup> In case of such plain contradiction, it is inferable from the decisions, that the construction of the language of the act would have to remain unaided by the title, even though the result be the avoidance of the statute, or some portion of it, on the ground of unconstitutionality.

§ 60. **Marginal Notes.**—[The marginal notes printed by the official printer in connection with the several sections of a statute, have been held to form no part of those sections, or of the statute, so as to throw light upon the question of construction.<sup>18</sup> Nor, when they appear on the rolls of the Legislature itself, as, since 1849, they do in England, are they to be regarded as forming part of the enactment, or as binding as an explanation or as a construction of the same.<sup>19</sup> They are merely abstracts of the clauses, intended

<sup>15</sup> See *Nazro v. Merchants', etc. Co.*, 14 Wis. 295; *Dodd v. State*, 18 Ind. 56.

<sup>16</sup> See *ante*, § 1, note 1.

<sup>17</sup> *Connecticut, &c., Ins. Co. v. Albert*, 39 Mo. 181.

<sup>18</sup> *Clagdon v. Green*, L. R. 2 C. P. 521; *Birtwhistle v. Vardill*, 7 Cl. & Fin. 895, 929.

<sup>19</sup> *Atty-Gen. v. G. E. R. R. Co.*, L. R. 11 Ch. D. 449; *Sutton v. Sutton*, L. R. 22 Ch. D. 513, overruling *In re Venour*, L. R. 2 Ch. D. 522, where it was intimated that

such marginal notes now formed part of the act and might be used for the purpose of interpreting it, *Jessel, M. R.*, saying, at p. 525, that, within his knowledge, they had been the subject of motion and amendment; a statement at variance with that of *Baggallay, L. J.*, in *Atty-Gen. v. G. E. R. R. Co.*, *supra*, at p. 461: "I never knew an amendment set down or discussed upon the marginal note to a clause. The House of Commons never has anything to do



to catch the eye,<sup>20</sup> and to make the task of reference easier and more expeditious.<sup>21</sup> But it was said, in one case, that, where a marginal note, instead of being a mere abstract of a section, gave express directions as to the form of an order which it accompanied, and was on the margin of the legislative roll, it was to be held a part of the statute,<sup>22</sup> and the effect of marginal references, in a revision to the original acts has already been noticed.<sup>23</sup>

§ 61. **Punctuation.**—[The effect of punctuation in a statute, as an element in its construction, is not determined by the courts with absolute uniformity. It has been repeatedly asserted that punctuation is no part of a statute;<sup>24</sup> that there is no punctuation in it which ought to control its interpretation;<sup>25</sup> that it is not to be regarded in construction;<sup>26</sup> or, at any rate, may be properly disregarded,<sup>27</sup> and that an erroneous punctuation of a statute, in printing it, ought not to be allowed an effect which would lead to an absurdity.<sup>28</sup> Hence, a comma may be transferred from after a word to before it, to effectuate the obvious intent of the statute;<sup>29</sup> or carried back several words, in order to prevent the sacrifice of a material and significant word;<sup>30</sup> or inserted for a similar purpose, as in the phrase "stolen or taken by robbers."<sup>31</sup>

[On the other hand, it has been said, that, whilst not a decisive test of construction, the punctuation in a statute may yet be some indication of its meaning;<sup>32</sup> and that that meaning may often be determined from the punctuation.<sup>33</sup>

with the amendment of the marginal note. I never knew a marginal note considered by the House of Commons."

<sup>20</sup> *Ibid.*, at p. 465.

<sup>21</sup> *Wilb.*, Stat. Law, p. 294.

<sup>22</sup> *R. v. Milverton*, 5 A. & E. 841.

<sup>23</sup> See ante, § 51; *Nicholson v. Mobile, etc.*, R. R. Co., 49 Ala. 205.

<sup>24</sup> *Hammock v. Loan Co.*, 105 U. S. 77.

<sup>25</sup> *Gyger's Est.*, 65 Pa. St. 311, 312; *Com'th v. Shopp*, 1 Woodw. (Pa.) 123, 129. See also *U. S. v. Isham*, 17 Wall. 496, 502.

<sup>26</sup> *Cushing v. Worrick*, 9 Gray (Mass.) 382.

<sup>27</sup> *Martin v. Gleason*, 139 Mass. 183; *Albright v. Payne*, 43 Ohio St. 8; *Shriedley v. State*, 23 Id. 130; *Hamilton v. The R. B. Hamilton*, 16 Id. 428.

<sup>28</sup> *Randolph v. Bayne*, 44 Cal. 366.

<sup>29</sup> *Albright v. Payne*, supra.

<sup>30</sup> *Com'th v. Shopp*, supra.

<sup>31</sup> *Shriedley v. State*, supra; and compare ante, § 33, *McPhail v. Gerry*, 55 Vt. 174.

<sup>32</sup> *U. S. v. Three R. R. Cars*, 1 Abb. U. S. 196. And See *Albright v. Payne*, 43 Ohio St. 8.

<sup>33</sup> *Squires' Case*, 12 Abb. Pr. (N. Y.) 38.

Accordingly, where an act allowed certain fees to witnesses "for each day's attendance in court, or before any officer pursuant to law," it was held that the punctuation disconnected the latter phrase, "or before any officer," etc., from the preceding portion of the clause relating to attendance in the courts, and the former was, therefore, deemed to apply to attendance before commissioners only.<sup>34</sup>

§ 62. **Preamble.**—The preamble of a statute has been said to be a good means to find out its meaning, and, as it were, a key to the understanding of it;<sup>35</sup> and as it usually states, or professes to state, the general object and intention of the Legislature in passing the enactment, it may legitimately be consulted for the purpose of solving any ambiguity, or of fixing the meaning of words which may have more than one, or of keeping the effect of the Act within its real scope, whenever the enacting part is in any of these respects open to doubt. (a). Thus, in 26 Geo. 3, c. 107, s. 3, which empowered every person who had served in the militia and was married, to set up in trade in a corporate town, as freely as soldiers might under an earlier enactment, and declared that "no such militiaman" should be removeable from the town until he became chargeable,—it being open to doubt whether this expression included all married militiamen, or

<sup>34</sup> [Cummings v. Akron Cement, etc., Co., 6 Blatchf. 509.] Formerly, the bill was, at one of its stages, engrossed without punctuation on parchment: 1 Bl. Com. 183; but as neither the marginal notes nor the punctuation appeared on the roll, they formed no parts of the Act: Barrington Obs. on Stat. 394; see Barrow v. Wadkin, 24 Beav. 327; and the judgment of Maule, J., in R. v. Oldham, 21 L. J. M. C. 134, 2 Den. 473. This practice was discontinued in 1849, since which time the record of the statutes is a copy printed on vellum by the Queen's printer: May, Parl. P. Ch. 18; and both marginal notes and punctuation now appear on the rolls of Parliament. But whether they are now to be taken as parts of the statute is a question which has been raised

but not decided: *Seem* that they are not; *per* Willes, J., in Claydon v. Green, L. R. 3 C. P. 521, and *per* James, L. J., in Atty.-Genl. v. G. E. R. Co., 11 Ch. D. 465; *contra per* Jessel, M. R., in Re Venour, 2 Ch. D. 525 [see ante, note 19]; and see R. v. Milverton, 5 A. & E. 841.

The indorsement by the Clerk of the Parliaments of the date of the passing of the Act is part of it since 1793: 33 Geo. 3, c. 13.

<sup>35</sup> Co. Litt. 79a; 4 Inst. 330; Dyer, C. J., in Stowell v. Fouch, Plowd., at p. 369: "A key to open the minds of the makers of the act, and the mischief which they intended to redress."

(a) Bac. Ab. Stat. I. 2; Halton v. Cove, 1 B. & Ad. 558; Beard v. Rowan, 9 Peters, 317; The People v. Utica Insurance Co., 15 Johns. N. Y. Rep. 389.

only married militiamen who had set up in trade in towns, the preamble of the earlier Act fixed the latter as the true construction, as it stated that the mischief to be remedied was the state of the law which prevented soldiers from setting up in trade in corporate towns (*a*). The 18th sect. of the 12 & 13 Vict. c. 45, which enacted that "any order" of Quarter Sessions might be removed to the Queen's Bench for enforcement, was similarly confined to orders in appeal cases, by the preamble which, in reciting that it was expedient that the law should be made uniform in cases of appeal, showed the limited scope of the Act (*b*). Under a statute which enacted that when a person came into the occupation of premises for which the preceding tenant was rated to the poor, the old and new occupants should be liable to the rate in proportion to the time of their occupation, the question arose whether either, and if so, which of them, was to pay for the interval between the removal and the beginning of the second occupation; and this was determined by the preamble, which, by reciting that in consequence of rated occupiers removing without paying their rates, and other persons entering and occupying the premises for a part of the year, great sums were lost to the parish, showed that the object of the Act was not to make an equitable adjustment between the two occupiers, but to protect the parish from loss. It was therefore held that the rates were payable for the interval between the two occupations, and that the burden fell on the outgoing tenant, who was formerly liable under the Act of Elizabeth for the whole rate (*c*). An Act which made it penal for a publican to allow bad characters to "assemble and meet together" in his house, would not be broken by his permitting such persons to enter for taking refreshment, and remaining there as long as was reasonably necessary for that purpose; when the preamble showed that the object in view was the repression of disorderly conduct, not the absolute denial of all hospitality to persons of bad character (*d*). In the 25 Geo. 2, c. 6, which recited in the

(*a*) R. v. Gwenop, 3 T. R. 133.

(*b*) R. v. Bateman, 8 E. & B. 584,  
27 L. J. 95.

(*c*) 17 Geo. 2, c. 38, s. 12, repealed

by 32 & 33 Vict. c. 41, s. 16;  
Edwards v. Rusholme, L. R. 4 Q.  
B. 554.

(*d*) 23 Vict. c. 27, s. 32; Greig v

preamble a doubt as to who were legal witnesses to a will of 'and, and enacted that legatees and devisees who attested 'any will' should be good witnesses, but that the bequests and devises to them should be void, the enacting part was limited by the preamble to wills of land. Wills of personalty, at that time, needed no attestation; and the principle of cessante ratione cessat lex, as well as the injustice of depriving persons of property, making it reasonably doubtful whether the Legislature had used the expression "any will" in its full and unrestricted meaning, the preamble was legitimately invoked to determine the scope of the enactment (a). [And in a still more recent case, it was said that the court should give effect to the preamble to this extent, namely, that it shows what the Legislature is intending; and if the words of the enactment have a meaning which does not go beyond the preamble, or which may come up to the preamble, in either case that meaning should be preferred to one showing an intention of the Legislature which would not answer the whole purposes of the preamble or which would go beyond them.<sup>36</sup>

§ 63. [In substantial accord with the English cases, the rule is thoroughly recognized in this country, that, whilst the preamble is not a part of the statute, it may assist in ascertaining the true intent and meaning of the Legislature, and for that purpose, where the language is ambiguous, admitting of a larger or more restricted meaning, may be properly referred to as an aid in determining which sense was intended by the Legislature.<sup>37</sup>]

Bendeno, E. B. & E. 133, 27 L. J. M. C. 294. See *Belasco v. Han-*nant, 3 Best & S. 13, 31 L. J. M. C. 225.

(a) *Emanuel v. Constable*, 3 Russ. 526, overruling *Lees v. Summer-*gill, 17 Ves. 508; *Brett v. Brett*, 3 Addams 219. See other instances in *Wethered v. Calcutt*, 5 Scott, N. R. 409; *Doe v. Roe*, 1 Dowl. 547; *Carr v. Royal Exchange Ass. Co.*, 5 Best & S. 941, 31 L. J. Q. B. 93; *Re Masters*, 38 L. J. Q. B. 146.

<sup>36</sup> *West Ham Overseers v. Iler*, L. R., 8 App. Cas. 387, *per* Lord

Blackburn, adding: "To that extent only is the preamble material."

<sup>37</sup> See *U. S. v. Webster*, Dav. (2 Ware) 38; *Hahn v. Salmon*, 20 Fed. Rep. 301; *Lathrop v. Ins. Comm'rs*, 4 Ins. L. J. 829; *Jackson v. Gilchrist*, 15 Johns. (N. Y.) 89; *Edwards v. Pope*, 3 Ill. 465; *Bartlett v. Morris*, 9 Port. (Ala.) 266; *James v. Dubois*, 16 N. J. L. 285; *Erie, &c., R. R. Co. v. Casey*, 26 Pa. St. 287; *Com'th v. Marshall*, 69 Id. 328; *York Co. v. Crafton*, 100 Id. 619; *Fowler v. State*, 5 Day (Conn.) 81; *Laidler v. Young*,

So, as an Act which authorized aliens who "shall have been resident" in the country for two years, to hold land, might either be limited to persons who had so resided before the passing of the Act, or extend to those who should at any time reside for the required time, the preamble was resorted to in order to determine which of the two meanings was the most agreeable to the policy and object of the Act; and as it recited that aliens were prevented by law from holding lands in the State and it was the interest of the State that such prohibitions should be done away with, it showed that the former construction was less adapted to give effect to the intention of the Legislature than the latter (*a*). [And an act, the preamble of which declared its purpose to be the creation of highways, and the body of which declared a certain stream a public stream or highway for the passage of boats, or rafts, was held to cover the case of a number of logs, not fastened together, but floated in the stream contiguous to one another, the term 'raft' being capable, according to recognized authorities of embracing such a body of lumber, though that was not its usual acceptation, and the preamble showing that the latter would be a more restricted interpretation than was intended by the statute." An opposite effect was derived from the consideration of the preamble to an act which declared that "in all cases of criminal prosecutions, where by law the county of Y. is now liable to pay the costs of prosecution, including surety of the peace cases, after the conviction of the defendant, upon his discharge according to law without payment of costs, the said county shall be immediately liable to pay the costs," etc. The preamble recited the inconvenience arising to officers and witnesses from "long delay in recovering their fees," and the hardship occasioned thereby, "for

Har. & J. (Md.) 69; Canal Co. v. R. R. Co., 4 Gill & J. (Md.) 1; Lucas v. McBlair, 12 Id. 1; Nichols v. Wills, Sneed (Ky.) 301; Clark v. Bynum, 3 McCord (S. C.) 298; Blue v. McDuffie, 1 Busb. (N. C.) 131. And see cases cited ante, § 62, note *b*, p. 78.

(*a*) Beard v. Rowan, 9 Peters,

301. [An alien being by the law of Indiana, ineligible as a juror, the term is held to apply to one not a citizen of that state, so that a citizen of Indiana is eligible, though he be not a citizen of the U. S.: McDonel v. State, 90 Ind. 320.]

<sup>38</sup> Dedrick v. Wood, 15 Pa. St.

9.

remedy whereof," the statute was enacted. It was accordingly held to impose no liability upon the county to pay costs which it was not before required to pay, but only to require immediate payment of those costs which the county was theretofore liable to pay upon the discharge of the convict, and consequently not to repeal the general law, which, in surety of the peace cases, left it to the court to order payment of cost by the prosecutor or defendant, or by both jointly or by the county.<sup>39</sup>

[The preamble may also be referred to, to identify the subject matter of the enactment;<sup>40</sup> especially when referred to in the enacting clause for that purpose.<sup>41</sup> So, also, to explain the motive and meaning of the Legislature.<sup>42</sup>

§ 64. [The same decisions, however, which establish the doctrine above stated as to the admissibility of the preamble in the construction of a doubtful provision in a statute, also declare, that, when the meaning of the enacting part is clear and free from ambiguity, it cannot be controlled, with either enlarging or restraining effect, by the preamble.<sup>43</sup> And this, again, is in accordance with the English rule, that] the preamble cannot either restrict or extend the enacting part, when the language of the latter is plain, and not open to doubt either as to its meaning or its scope (*a*). It is not unusual to find that the enacting part is not exactly co-extensive with the preamble. In many Acts of Parliament, although a particular mischief is recited, the legislative provisions extend beyond it. The preamble is often no more than a recital of some of the inconveniences, and does not exclude any others for which a remedy is given by the

<sup>39</sup> York Co. v. Crafton, 100 Pa. St. 619.

<sup>40</sup> Com'th v. Marshall, 69 Pa. St. 328.

<sup>41</sup> *Ib.*

<sup>42</sup> *Ib.*

<sup>43</sup> See, in addition to cases already cited: Adams v. Wood, 2 Cranch, 336; Kirk v. Dean, 2 Binn. (Pa.) 341, 346; Seidenbender v. Charles, 4 S. & R. (Pa.) 151; Kent v. Somervill, 7 Gill & J. (Md.) 265; Covington v. McNickle, 18

B. Mon. (Ky.) 262; Eastman v. McAlpin, 1 Ga. 157.

(*a*) 4 Inst. 39; *per* Lord Mansfield in Pattenon v. Banks, Cowp. 543, and Perkins v. Sewell, 1 W. Bl. 659; *per* Dampier, J., in Trucman v. Lambert, 4 M. & S. 239; Wright v. Nutall, 10 B. & C. 492; Crespigny v. Wittenoom, 4 T. R. 793. *per* Buller, J.; Salter's Co. v. Jay, 3 Q. B. 109; Wilmot v. Rose, 3 E. & B. 563; Copland v. Davis, L. R. 5 H. L. 358; Bentley v. Rothe-ram, 4 Ch. D. 588.

Statute (*a*). The evil recited is but the motive for legislation; the remedy may both consistently and wisely be extended beyond the cure of that evil (*b*); and if on review of the whole Act a wider intention than that expressed in the preamble appears to be the real one, effect is to be given to it notwithstanding the less extensive import of the preamble (*c*). Thus the 4 & 5 Ph. & M. c. 8, made the abduction of all girls under sixteen penal, though the preamble referred only to heiresses and other girls with fortunes (*d*). So, the 13 Eliz. c. 10, which makes void all leases, gifts, grants and conveyances of estates, made by any dean and chapter, or master of an hospital, of any hereditaments, parcel of the possessions of the cathedral church or hospital, except for the limited term allowed by the Act, was not narrowed or controlled by a preamble which recited only that divers ecclesiastical persons, endowed of ancient palaces, mansions and buildings belonging to their benefices, not only suffered them to go to decay, but converted the materials to their own benefit, and conveyed away their goods and chattels to defeat their successors' claims for dilapidations (*e*).

§ 65. The 3 Jac. 1, c. 10, which, after reciting that the King's subjects were charged with conveying "felons and other malefactors and offenders against the law," to jail, punishable by imprisonment there, enacted that "every person" committed to the county jail by a justice "for any offense or misdemeanor," should bear his own charges of conveyance, if he had property, and that if he had not, they should be borne by the parish where he was apprehended, was held not to be confined by the preamble to offenders against the ordinary law, but to apply to deserters from the army (*f*). So, the preamble of the 22 Geo. 3, c. 75 (*g*), which recited the mischief of granting colonial offices to

(*a*) *Per* Fortescue, J., in *R. v. Athos*, 8 Mod. 144.

(*b*) *Per* Lord Denman, in *Fellowes v. Clay*, 4 Q. B. 349.

(*c*) *Per* Lord Tenterden, in *Doe v. Brandling*, 7 B. & C. 660; and see *Copeman v. Gallant*, 1 P. Wms. 320.

(*d*) Co. Litt. 88 b. n. 14.

(*e*) *York v. Middlesborough*, 2 Y. & J. 196, 214.

(*f*) *R. v. Pierce*, 3 M. & S. 62.

(*g*) Commonly attributed to Burke, but really an Act of Lord Shelburne's; see *Shelb. Life*, 337.

persons who remained in England, and discharged the duties of their offices by deputy, was not suffered to exclude judicial offices from the general enacting part, which authorised the Governor and Council to remove "any" office-holder for misconduct; although the mention of delegation in the preamble showed that the judicial office was not there in contemplation (a).

The 2 & 3 W. 4, c. 100, which after reciting that the expense and inconvenience of suits for the recovery of tithes ought to be prevented by shortening the time required for the valid establishment of claims to exemption from tithes, enacted that when a claim to tithes was made by a layman, a claim to exemption should be deemed conclusively established by proof of non-payment for sixty years, gave rise to a celebrated legal controversy, in which the effect of the preamble was much considered. Before the passing of that Act, no layman could establish exemption from tithes, except by proving that the land in respect of which they were claimed had formerly belonged to one of the great Monasteries, and had been exempt in its hands; the latter proposition being usually established by such evidence of non-payment in modern times as sufficed for founding the inference of exemption. It was held by some of the judges (b), that the enactment was confined to claims of this kind; and the preamble was invoked in support of this view. But it was considered by others (c), and finally decided (d), that the Act applied to all cases whatsoever; and that upon proof of non-payment for sixty years, the landowner was exempt, whether the land had ever been monastic or not. The enactment was free from ambiguity, and contained no flexible expression capable of different meanings (e); while the preamble, which one side understood as meaning that the expense and inconvenience of the same kind of suits as before ought to be prevented, was

(a) *Willis v. Gipps*, 5 Moo. P. C. 379, see p. 383.

(b) *Wigram, V. C., Tindal, C. J., Cresswell, J., Patteson, J., and Coleridge, J.*

(c) *Lord Denman, Williams, Coltman, Erle, JJ., Pollock, C.*

*B., Parke, Alderson, and Platt, BB.*

(d) *By Lord Cottenham.*

(e) *Per Lord Cottenham, in Salkeld v. Johnson*, 1 Mac. & G. 264.



thought on the other to mean that expensive and inconvenient suits ought to be prevented in all cases ; and that this was best affected by giving the more easy method of establishing exemptions by simple proof of non-payment for a certain time (*a*).

Where the preamble is found more extensive than the enacting part, it is equally inefficacious to control the effect of the latter, when otherwise free from doubt. For instance, the Act of 3 W. & M. c. 14, s. 3 (*b*), which gave creditors an action of "debt" against the devisees of their debtor was held not to authorise an action for a breach of covenant, or for the recovery of money not strictly a "debt" (*c*); though the preamble recited that it was not just that by the contrivance of debtors their creditors should be defrauded of their debts, but that it had often happened that after binding themselves by bonds "and other specialties" they devised away their property. The mention, it was observed, of the action of debt in the enacting part was almost an express exclusion of every other (*d*). An Act, which made it penal to dye seeds so as to give them the appearance of seeds of "another kind," could not be extended to similar manipulations of old or inferior seeds, to make them appear as new of the same species, by a recital that the practice of adulterating seeds in fraud of the Queen's subjects, and the detriment of agriculture required repression (*e*). An Act which required the trustees of a turnpike trust to apply the monies which they received, first, in paying "any interest which might from time to time be owing," next, in keeping the road in repair, and finally, in paying off the principal sums due by the trust, was held not to authorise the payment of arrears of interest ; although this enactment was prefaced by a preamble which recited that arrears of interest as well as principal sums were due by the trust, and could not be paid off unless

(*a*) See *Salkeld v. Johnson*, 1 Hare, 196, 1 Mac. & G. 242, *Fel-lows v. Clay*, 4 Q. B. 313.

(*b*) Amended by 1 W. 4, c. 47, s. 3.

(*c*) *Wilson v. Knubley*, 7 East, 128 ; *Farley v. Bryant*, 3 A. & E.

839 ; *Jenkins v. Briant*, 6 Sim. 630 ; *Morse v. Tucker*, 5 Hare, 79.

(*d*) *Per Lord Ellenborough*, 7 East, 135.

(*e*) *Francis v. Maas*, 3 Q. B. D. 341.

further powers were granted (*a*). Such an extension of the Act, however, would have required very clear words, since it would have had the effect of throwing on the ratepayers of one year a burden properly belonging to those of another (*b*).

§ 66. It has been sometimes said that the preamble may extend, but cannot restrain the enacting part of a statute (*c*). But it would seem difficult to support this proposition (*d*). Several of the cases above cited might be referred to as instances of a restricted meaning having been judicially given to an enactment by its preamble (*e*). It could hardly be doubted that a statute which, in general terms, made it felony to alter a bill of exchange, would be restrained to fraudulent alterations, by a preamble which recited that it was desirable to suppress cheats and frauds effected by altering bills (*f*). The function of a preamble is to explain what is ambiguous in the enactment (*g*), and it may either restrain as well as extend it as best suits the intention. [That is, where the not restraining the generality of the enacting clause will be attended with an inconvenience or particular mischief, it shall be restrained by the preamble; otherwise not.<sup>45</sup> But the preamble of general purview of the act ought not to be permitted to restrict a section in it, where the same is not inconsistent with the spirit of the whole enactment.<sup>46</sup> It is scarcely necessary to add that a defective or repugnant preamble cannot nullify or render void or inoperative an

(*a*) *Market Harborough v. Kettering*, L. R. 8 Q. B. 308.

(*b*) See §§ 345 et seq.

(*c*) *R. v. Athos*, 8 Mod. 144, *Copeman v. Gallant*, 1 P. Wms. 320; *per* Lord Abinger in *Walker v. Richardson*, 2 M. & W. 889; *per* Willes, J., in *Hayman v. Flewker*, 13 C. B. N. S. 536, 32 L. J. C. P. 132; *per* Turner, L. J., in *Drummond v. Drummond*, L. R. 2 Ch. 44; *per* Crowder, J., in *Kearns v. Cordwainer's Co.*, 6 C. B. N. S. 388.

(*d*) See ex. gr., *per* Parker, C. B. and Lord Hardwicke in *Ryall v. Rolle*, 1 Atk. 174, 182.

(*e*) *R. v. Gwenop*, 3 T. R. 133; *R. v. Bateman*; *Edwards v. Rus-*

*holme*; *Emanuel v. Constable*; *Bryan v. Child*; *Salkeld v. Johnson*, sup. pp. 79, 80, 85, and *infra*, p. 88. See also *per* Cur., *R. v. Manchester*, 7 E. & B. 453, 26 L. J. M. C. 65; *Hughes v. Chester R. Co.*, 1 Dr. & Sm. 524; *Wigan v. Fowler*, cited 1 Stark. 459.

(*f*) *R. v. Bigg*, 3 P. Wms. 434, *arg.*

(*g*) *The People v. Utica Insur. Co.*, 15 Johns. N. Y. Rep. 389.

<sup>45</sup> *Seidenbender v. Charles*, 4 Serg. & R. (Pa.) 151, 166, *per* Gibson, J., *cit.* *Ryall v. Rowles*, 1 Vez. 365.

<sup>46</sup> *Sutton v. Sutton*, L. R. 22 Ch. D. 521.

act in which the intention of the lawmakers is clear without aid from the preamble."

§ 67. **Matters Similar to Preamble. Recitals.**—[The cases already quoted involved the effect of the general clause prefixed to the whole of the statute, and properly called the preamble. Sometimes, however, a similar clause is prefixed to one section, or a group of sections, and it may then be distinguished by the name of recital,<sup>48</sup> the effect of such recital being much the same as that of the preamble." Thus a recital, in the fifth section of 11 and 12 Vic. c. 44, that it would conduce to the administration of justice, and render more effective and certain the performance of the duties of justices and give them protection in the performance of the same, if some simple means were devised whereby the legality of any act done by such justices might be considered by a court of competent jurisdiction, and such justices enabled and directed to perform it without risk of action, was given the effect of restricting the enacting clause, providing that in all cases where a justice refused to do "any act," an application might be made for a rule calling upon him to show cause why he should not do it, in such manner, that the words "any act" must be taken to mean any act against the consequences of which a justice needed protection." On the other hand,] the 5 Geo. 4, c. 84, s. 26, which after reciting that transported felons in New South Wales, after obtaining remissions, sometimes "by their industry acquired property, in the enjoyment whereof it was expedient to protect them," enacted that every felon who received such remission should be entitled to sue for the recovery of any property, real or personal, acquired since his conviction, was held not limited by the preamble to property acquired by his own exertions, but applied to all property howsoever acquired, as for instance by inheritance (a).

<sup>47</sup> *Erie, &c. R. R. Co. v. Casey*, 26 Pa. St. 287.

<sup>48</sup> *Wilb.*, p. 282.

<sup>49</sup> The same figure of speech (ante, § 62) by which Lord Coke and Chief Justice Dyer described the preamble having been applied to such recital by Willes, J., in

*Earl of Shrewsbury v. Beazley*, 19 C. B., N. S., at p. 681.

<sup>50</sup> *R. v. Percy*, L. R. 9 Q. B. 64. See also *Johnstone v. Huddleston*, 4 B. & C. 922, 936; *Winn v. Mossman*, L. R. 4 Ex. 292; *Wilb.*, pp. 282-285.

(a) *Gough v. Davies*, 2 K. & J. 623, 25 L. J. 677.

§ 68. **Reports of Committees. Petitions. Maps.**—[An effect similar to that of a preamble was given to the report of a committee presented and adopted with an ordinance, as showing its reason,<sup>51</sup> and the report of commissioners who drafted the Pennsylvania act of 8 April, 1833, relating to wills, was looked at by the Supreme Court of that State in construing the sixth section of the act, prescribing the mode of execution, so far as to aid in ascertaining its "primary and principal object."<sup>52</sup>

[Again, in the case of an act authorizing a municipal corporation to make grants of land under water, the preamble reciting a part of the petition of the city government upon which the act was based, it was held that both the preamble and the petition might be referred to, to remove ambiguities in the act itself.<sup>53</sup>

[Where a map was used by the Legislature while considering an act, and referred to in the act itself, it was held to be thereby incorporated into and made part of the act.<sup>54</sup>]

§ 69. **Chapter, Section, etc., Headings.**—The headings prefixed to sections or set of sections in some modern statutes are regarded as preambles to those sections (*a*). The 137th section of the Bankrupt Act of 1849, which enacted that a judge's order to sign judgment, given by a trader defendant, should be void if not filed, was held limited to traders who became bankrupt, by the heading prefixed to the section which professed to enact it "with respect to transactions with the bankrupt" (*b*). A wider construction, it may be added, would have had the unjust effect of enabling the

<sup>51</sup> *Municipality No. 2 v. Morgan*, 1 La. An. 111.

<sup>52</sup> *Baker's App.*, 107 Pa. St., 381, 388, in conjunction, however, with other decisions declaring the same result.

<sup>53</sup> *Furman v. New York*, 5 Sandf. (N. Y.) 16. Compare, however, ante, § 33, and *Bank of Pa. v. Com'th*, 19 Pa. St. 144, 156, where it is said that "evidence of public embarrassment, the proclamation and message of the Governor, the journals of the House of Representatives, and the report of its committees, should be wholly

disregarded," as being "not only of no value," but "delusive and dangerous."

<sup>54</sup> *People v. Dana*, 22 Cal. 11.

(*a*) See ex. gr., *Bryan v. Child*, 5 Ex. 368; *Shrewsbury v. Beasley*, 19 C. B. N. S. 651; *E. C. R. Co. v. Marriage*, 9 H. L. 41; *Latham v. Lafone*, L. R. 2 Ex. 119; *Hammersmith Ry. Co. v. Brand*, L. R. 4 H. L. 171; *Lang v. Kerr*, 3 App. 536; *Comp. Broadbent v. Imperial Gas Co.*, 7 De G., M. & G. 436.

(*b*) *Bryan v. Child*, 5 Ex. 368, 1 L. M. & P. 429.

trader who had not become bankrupt to set aside as void his own deliberate act, an intention not to be imputed to the Legislature, if the language admits of any other meaning (*a*). [The effect, however, upon the interpretation of a statute, of its division into parts to which appropriate headings are prefixed, is a matter upon which judicial opinions are much divided. It is said by an eminent writer, that "the chapter headings and the like, in the revisions of statutes and in codes, are deemed to be of somewhat greater effect than the ordinary titles to legislative acts."<sup>55</sup> It is, indeed, said that "Those headings are not titles of the acts, but are parts of the statute, limiting and defining their effect."<sup>56</sup> Accordingly, in considering the governor's power of appointment by virtue of a section under a heading "Of the public officers of this State others than militia and town officers," it was said: "The power of appointing militia officers is, by this heading, expressly excepted from the effect of this language. It is an explicit declaration that the authority thus conferred, does not reach the case of a militia officer."<sup>57</sup> Similarly, it has been held, that, the division of a statute into separate subjects or articles, with appropriate headings, makes the provisions of each article controlling upon the subject of the same, as a general rule for determining such questions as may be embraced therein;<sup>58</sup> and that the chapters and titles in a revised body of laws are to be regarded as of greater influence in the construction of the provisions collated under them, than can be accorded to the title of a statute in ordinary."<sup>59</sup> So, where, in a statute,<sup>60</sup> a series of sections<sup>61</sup> was preceded by the general heading "with reference to the construction of the railway and the works connected therewith" it was held that

(*a*) See §§ 267-269.

<sup>55</sup> Bishop, *Written Laws*, § 46, p. 47, citing, in support of this statement: *Barnes v. Jones*, 51 Cal. 303; *People v. Molyneux*, 40 N. Y. 113; *Huff v. Alsup*, 64 Mo. 51; *Griffin v. Carter*, 8 Kan. 565; *Battle v. Shivers*, 39 Ga. 405; *The State v. Popp*, 45 Md. 432; *U. S. v. Fehrenback*, 2 Woods, 175; *Nicholson v. Mobile, &c. Railroad*, 49 Ala. 205.

<sup>56</sup> *People v. Molyneux*, 40 N. Y. 113, 119.

<sup>57</sup> *Ib.*, at p. 118. And see to similar effect: *Bishop v. Barton*, 2 Hun (N. Y.) 436.

<sup>58</sup> *Griffith v. Carter*, 8 Kan. 565.

<sup>59</sup> *Barnes v. Jones*, 51 Cal. 303. See *Huff v. Alsup*, 64 Mo. 51, where it was held that the divisions into chapters in *Wagner's Statutes* had not the force of legislative enactment.

<sup>60</sup> *Railway Clauses Consolidation Act*, 1845; 8 and 9 Vic. c. 20.

<sup>61</sup> 6-24.

this heading so limited the words of the sections that the compensation they provided applied only to cases of injuries caused by the construction and not to those of injuries caused by the use, of the railway.<sup>62</sup>

§ 70. [On the other hand, it is undoubtedly a sound rule of construction, and one which has been followed in a multitude of cases, that, where the intention of the Legislature can be gathered with certainty,<sup>63</sup> that intention, rather than the collocation of the different branches of a provision leading to a different conclusion, is to govern the interpretation.<sup>64</sup> It would seem to follow, that the fact that a particular provision is placed in a group prefaced by a particular heading, should not give the latter any very great weight in either extending or restricting the plain language of the provision, nor prevent a construction of it in connection with, and in the light of other provisions in other parts of the statute, classed under different headings, where, in the absence of such a division and classification, a comparison of all such provisions would be proper. It may be regarded as the sound view, that the grouping of provisions in an extended statute, a code, or a revision of laws, is, in general, designed for "convenience of reference, not intended to control the interpretation."<sup>65</sup> Or, at most, it may be regarded as indicating the opinion of the draftsman, the legislators, or codifiers, as to the proper classification of the various branches of the enactment; which may or may not be accurate.<sup>66</sup> The mere classifications can scarcely be deemed a part of the law.<sup>67</sup> "The only satisfactory and safe rule of construction to be adopted, is to read and construe together all sections of the Code relating to the same subject matter, without reference to the particular article or heading under which they may be placed."<sup>68</sup> Hence the generality of a heading under

<sup>62</sup> *Brand v. Hammersmith Ry. Co.*, L. R. 1 Q. B. 130; 2 Q. B. 223; 4 H. L. 171.

<sup>63</sup> *E.g.*, by the reason of the thing,—by grammatical construction of the section as it stands, showing that a certain clause should follow another,—by the context,—and by reference to the

legislative journals: *Matthews v. Com'th*, 18 Gratt. (Va.) 989.

<sup>64</sup> See *Ibid.*, and post, § 318.

<sup>65</sup> *Union Steamsh. Co. v. Melbourne Harbour Trust*, L. R. 9 App. Cas. 365.

<sup>66</sup> See *Battle v. Shivers*, 39 Ga. 405.

<sup>67</sup> *Ibid.*

<sup>68</sup> *State v. Popp*, 45 Md. 432.

which a particular provision is placed will not be permitted to extend the proper meaning of the same. Thus a provision as to when judgments shall become dormant was not deemed to be affected by a general act suspending all statutes of limitation, simply because the former appeared, in the code, as part of the chapter devoted to statutes of limitations." Nor will such heading be given the effect of unduly restricting the meaning of such a provision, or of a phrase used in the same. Hence, where one section in a group covered by a general heading obviously refers to a subject matter which is separate and distinct from that specified in the heading and dealt with in the remaining sections under the same, it is to be construed without regard to the heading." To illustrate: where a section<sup>70</sup> which gave compensation for injury to land formed one of a group prefaced by the words "with respect to the purchase and taking of lands otherwise than by agreement," it was held that this heading did not limit the effect of the section, or render it "an enactment relating to the taking of land by compulsion when it obviously has reference to no such purpose."<sup>71</sup> So, where an act provided, that "In the construction and for the purpose of this Act, the following terms shall, if not inconsistent with the context or subject matter, have the respective meanings hereby assigned to them," and then provided that "Person shall include a corporation," and Part ii. of the act was headed "officers;" it was held that the words "person" occurring in that group was not to be confined to "officers," because of the heading, since other matters besides officers were included as the subject matters of the same.<sup>72</sup>

§ 71. *Schedules*.—[A schedule to an act, it is said, is not itself an enactment, though it may be an aid in explaining one that is doubtful.<sup>73</sup> As such, it cannot, of course, control the positive words of the statute itself. So, where an

<sup>69</sup> *Battle v. Shivers*, *supra*.

<sup>70</sup> *Wilb.*, p. 296.

<sup>71</sup> § 68, *Land Clauses Act*, 8 and 9 *Vic. c. 18*.

<sup>72</sup> *Broadbent v. Imper. Gas Co.*, 7 *De G., M. & G.* 436, 447, 448; and see *Brand v. Hammersmith,*

*Ry. Co.*, *L. R.* 4 *H. L.* 171, 217.

<sup>73</sup> *Union Steamsh. Co. v. Melbourne Harbour Trust*, *L. R.* 9 *App. Cas.* 365.

<sup>74</sup> *R. v. Epsom*, 4 *E. & B.* 1003, 1008, 1012, per Lord Campbell, C. J.

act provided that two sworn appraisers should value goods distrained for rent, and the schedule to a later act specified sixpence in the pound as the charge for appraisement, "whether by one broker or more," it was held that this did not repeal the requirement of two appraisers.<sup>75</sup> A form given in a schedule, especially if there is no reference to it in the body of the act, is to be regarded merely as an example.<sup>76</sup> And even where such reference is made, if the form given in the schedule diverges from the plain requirements of the body of the act, it cannot be held to repeal the same; as, where the act provided that all informations exhibited before any justice or justices of the peace for any offense against the customs should be drawn in the form or to the effect in the schedule annexed to the act, and the form in the schedule used words indicating that the information was supposed to be made before two justices, it was held that this circumstance did not override the provisions of the act; that the information might be made before one justice; and that the form prescribed might be accordingly modified.<sup>77</sup>

§ 72. *Resumé.*—In a word, then, it is to be taken as a fundamental principle, standing, as it were, at the threshold of the whole subject of interpretation, that the intention of the Legislature is invariably to be accepted and carried into effect, whatever may be the opinion of the judicial interpreter, of its wisdom and justice. If the language, [read in the order of its clauses,<sup>78</sup> presents no ambiguity and]

<sup>75</sup> *Allen v. Flicker*, 10 A. & E. 640.

<sup>76</sup> *Hannah v. Whyman*, 2 C. M. & R. 239.

<sup>77</sup> *R. v. Russell*, 13 Q. B. 237. It follows, that, where a form is prescribed by a schedule, it is "only to be followed implicitly so far as the circumstances of each case may admit;" *Bartlett v. Gibbs*, 5 M. & G., at p. 96. But see, for instances in which it was held that the forms contained in the schedules to Acts of Parliament must be strictly followed: *Davidson v. Gill*, 1 East, 64; *R. v. Pinder*, 24 L. J. Q. B. 148; *Liverpool Borough Rk v. Turner*, 14 J. & H. 159; 2 De G., F. & J. 502. The result of the

cases upon this subject would seem to be, that the form prescribed in the schedule must be followed if this can be done without inconvenience or sacrifice of the effect and operation the act is intended to have; but that, where such would be the consequences of strictly following the prescribed form, the latter, "which is made to suit rather the generality of cases than all cases, must give way;" *R. v. Barnes*, 12 A. & E. 227. And see *Wilb.*, pp. 306–308, from which this note and the above section is mainly compiled; and post, § 197.

<sup>78</sup> See *Poor v. Considine*, 6 Wall. 458.



admits of no doubt or secondary meaning, it is simply to be obeyed, without more; [for the intention, controlling though it be, can be resorted to only to find what the Legislature intended to do, not what it has done.<sup>79</sup>] If it admits of more than one construction, the true meaning is to be sought, [first of all, in the statute itself<sup>80</sup> as applied to the subject matter to which it relates<sup>81</sup>—not on the wide sea of surmise and speculation,<sup>82</sup> but “from such conjectures as are drawn from the words alone, or something contained in them” (a); that is, from the context viewed by such light as its history may throw upon it, and construed with the help of certain general principles, and under the influence of certain presumptions as to what the Legislature does or does not generally intend.

<sup>79</sup> *Leavitt v. Blatchford*, 5 Barb. (N. Y.) 9.

<sup>80</sup> *Tyman v. Walker*, 35 Cal. 634; *Virginia, etc. R. R. Co. v. Lyon Co.*, 6 Nev. 68.

<sup>81</sup> *Brewer v. Blougher*, 14 P. 178.

<sup>82</sup> *Cearfoss v. State*, 42 Md. 403. (a) *Puff. L. N. C.* 5, c. 12, s. 2, note by Barbeyrac.

## CHAPTER IV.

PRESUMPTIONS ARISING FROM SUBJECT MATTER AND OBJECT  
OF ENACTMENTS, AS TO LANGUAGE USED.

- § 73. Words Construed with Reference to Subject Matter and Object.
- § 74. Technical Meaning.
- § 76. Popular Meaning.
- § 78. Ordinary Meaning Preferred.
- § 81. Rules of Grammar.
- § 83. Commercial, etc., Terms.
- § 84. Meaning Differing in Different Localities.
- § 85. Meaning of Words at Date of Enactment.
- § 86. Restriction of General Words to Subject Matter, etc.
- § 87. "Persons," and other General Words.
- § 91. "Inhabitant," "Resident," etc.
- § 95. "Occupier," etc.
- § 96. "Owner."
- § 97. Additional Illustrations.
- § 102. Object may Supply Unexpressed Condition.
- § 103. Beneficial Construction.
- § 104. "Done" including "Omitted."
- § 105. Qui Facit per Alium, etc.
- § 107. Liberal Construction of Remedial Acts.
- § 108. What are Remedial Acts.
- § 110. Extension beyond Letter. General Intent.
- § 112. Extension to New Things.

§ 73. **Words Construed with Reference to Subject Matter and Object.** —The words of a statute are to be understood in the sense in which they best harmonize with the subject of the enactment and the object which the Legislature has in view (*a*). Their meaning is found not so much in a strictly grammatical or etymological propriety of language, nor even in its popular use, as in the subject or in the occasion on which they are used, and the object to be attained (*b*). [That is, in the construction of a statute, as in that of other instruments, words are to be understood, not according to their mere ordinary general meanings but according to their ordi-

(*a*) Sup., § 27.

(*b*) *Per Cur.* in *R. v. Hall*, 1 B. & C. 136; *Grot. de B. & P.* b. 2, s. 16; *Puff. L. N.* b. 5, c. 12, s. 3.

nary meaning as applied to the subject matter with regard to which they are used, unless indeed there be something requiring them to be read in a sense which is not their ordinary sense in the English language as so applied.<sup>1</sup> "It is a general and very sound rule, applicable to the construction of every statute, that it is to be taken in reference to its subject matter."<sup>2</sup> And equally the construction ought to be with reference to the object to be accomplished by the act,<sup>3</sup> and to keep in view the conditions existing.<sup>4</sup> This is evident enough in the simple case of a word which has two totally different meanings. The Act of Ed. III., for instance, which forbade ecclesiastics to purchase "provisions" at Rome, would be construed as referring to those papal grants of benefices in England which were called by that name, and not to food; when it was seen that the object of the Act was not to prevent ecclesiastics from living in Rome but to repress papal usurpations (c). ["The same words might mean a very different thing when put in to impose a tax, from what they would mean when exempting from a tax."<sup>5</sup>] The "vagabond" of the Vagrant Act, is not the mere wanderer of strict etymology (d). No one is likely to confound the "piracy" of the high seas with the "piracy" of copyright; or to give, in one branch of the law, the meaning which would belong, in another, to a host of familiar words, such as "accept," "assure," "issue," "settlement." In the Succession Duty Act, which provides that the instalments of duty payable by a successor shall cease at his death, except when he is "competent to dispose by will of a continuing interest in the property," the competency intended is obviously not mental sanity or freedom from personal incapacity, but the possession of an estate of inheritance which

<sup>1</sup> Lion Ins. Ass'n v. Tucker, L. R. 12 Q. B. D. 186.

<sup>2</sup> Sedgw. p. 359. And see to same effect: Brewer v. Blougher, 14 Pet. 198; Op. of Justices, 7 Mass. 523; State v. Mayor of Paterson, 35 N. J. L. 197; Catlin v. Hull, 21 Vt. 152; Ruggles v. Washington Co., 3 Mo. 496; and illustrations infra. See also, Bish., Writt. Laws, §§ 95a, 98a, 111, and cases cited.

<sup>3</sup> People v. Dana, 22 Cal. 11, and infra.

<sup>4</sup> Anderson v. R. R. Co., 117 Ill. 26.

(c) 1 Bl. Comm. 60; Statutes of Provisors or Præmunire passed in 1343, 1353, 1364, 1390, and 1401.

<sup>5</sup> Blackburn, J., in Rein v. Lane, L. R. 2 Q. B. at p. 151.

(d) Monck v. Hilton, 2 Ex. D. 268.

is capable of disposition by will (a). The Gas Works Consolidation Act, did not, by calling the debt due for gas, "rent," authorize a distress for the debt under the Bankrupt Act, which regulates the power of distress of a landlord "or other person to whom 'rent' is due" by the bankrupt (b). The Mutiny Acts which exempt soldiers from the payment of tolls over "bridges," would not carry the exemption to a steam ferry boat, because it is called a floating bridge (c). The enactment which prohibited parish officials from being concerned in contracts for supplying goods, materials or provisions, "for the use of the workhouse," meant "for the use of the persons in the workhouse," and therefore did not apply to a contract for the supply of materials for the repair of the building. (d) [A moving train of cars is not a "structure" such as contemplated by an act making railway companies liable for injuries on the highway by structures legally placed by them upon it.\*]

§ 74. **Technical Meaning.**—[An obvious result of this rule is, that,] where technical words are used in reference to a technical subject, they are primarily interpreted in the sense in which they are understood in the science, art, or business in which they have acquired it (e). [Thus, upon subjects relating to courts and legal proceedings, the Legislature may

(a) 16 & 17 Vict. c. 51, s. 21; *Attorney-General v. Hallett*, 2 H. & N. 368, 27, L. J. 89. See also *R. v. Owen*, 15 Q. B. 476. As to a judgment being "final," *Ridsdale v. Clifton*, 2 P. D. 276, 46 L. J. 27. [See § 74, note 9.]

(b) 32 & 33 Vict. c. 71, s. 34; *Exp. Hill*, 6 Ch. D. 63, 46 L. J. 116. As to "tolls" in railway acts, see the cases collected in the judgment of Field, J., in *Brown v. G. W. R. Co.*, 9 Q. B. D. 750. That water "rates" paid by consumers of water supplied through municipal water-works are not taxes, see *Jones v. Water Comm'rs of Detroit*, 34 Mich. 273. And see *Smith v. Philadelphia*, 81 Pa. St. 38; *Girard, etc., Co. v. Philadelphia*, 88 Id. 393, 394.

(c) *Ward v. Gray*, 6 B. & S. 345.

(d) 55 Geo. 3, c. 137, s. 6; *Barber v. Waite*, 1 A. & E. 514; *Comp. 4 & 5 Wm. 4, c. 76, s. 77*.

\* *Lee v. Barkhamsted*, 46 Conn. 213. But under a statute giving mechanics' liens to mining claims, a mine or pit sunk was deemed a "structure;" *Helm v. Chapman*, 66 Cal. 291.

(e) *Grot. b. 2, c. 16, s. 3*; *Vattel, b. 2, s. 276*; *Evans v. Stevens*, 4 T. R. 462, *per Lord Kenyon*; *Morrall v. Sutton*, 1 Phil. 533; *Doe v. Jesson*, 2 Bligh, 2; *Doe v. Harvey*, 4 B. & C. 610; *Abbot v. Middleton*, 7 H. L. 68, 28 L. J. Ch. 110; *The Pacific*, 33 L. J. P. M. & A. 120; see *per James, L. J.*, in *Boucicault v. Chatterton*, 5 Ch. D. 275. [Clark v. Utica, 18 Barb. (N. Y.) 451, and see ante, §§ 2, 3, and infra.]

be presumed to speak technically, unless, from the statute itself, a different use of the language may be apparent.<sup>7</sup> Hence where an act gave the effect of judgments to rules of Court, for the payment of money, and a later one (the Common Law Procedure Act, 1854, s. 60) authorized creditors who obtained judgment to recover the amount by the new process, which it introduced, of foreign attachment, it was held that this remedy did not apply to rules of Court, the object of the former Act appearing to be merely to give to rules the then existing remedies of judgments, and of the latter, to confine the new remedy to judgments in the strict acceptation of the term (*a*). [And where an act directed that the coroner should serve process in cases in which the sheriff was a *party*, it was held that he must be technically a party, and that his merely being interested in a suit was not sufficient.<sup>8</sup> So, where an act declared that a judgment entered in certain proceedings should be *final*, it was declared that the word should be taken in its technical sense and as precluding an appeal.<sup>9</sup> Again, proceedings in insolvency were held not to be an *action* within the meaning of that word in a statute saving from the effect of the passage or repeal of an act actions pending at the time.<sup>10</sup> Nor does the term *proceeding* in the provision of a code, that "no action or proceeding commenced" before its adoption shall be affected by it, include a judgment, the latter, being an entire act, and incapable, in any proper sense, of being said to be commenced before a certain day.<sup>11</sup> Nor is an election covered by a similar clause as to "proceedings."<sup>12</sup> Nor, again, is a petition for partition an action within the meaning of a statute giving costs, to the prevailing party in all actions.<sup>13</sup> A writ of *levari facias sur mortgage* is civil *process* within the meaning of the Pennsylvania stay-laws;<sup>14</sup>

<sup>7</sup> Merchants' B'k v. Cook, 4 Pick. (Mass.) 405.

(a) *Re Frankland*, L. R. 8 Q. B. 18; *Best v. Pembroke*, L. R. 8 Q. B. 363.

<sup>8</sup> Merchants' B'k v. Cook, *supra*. See, for similar construction of "party" under act compelling production of books, etc.: *Adrianne v. Sanders*, 11 Abb.

N. C. (N. Y.) 422.

<sup>9</sup> *Snell v. Bridgewater, etc., Co.*, 24 Pick. (Mass.) 296.

<sup>10</sup> *Belfast v. Folger*, 71 Me. 403.

<sup>11</sup> *Daily v. Burke*, 28 Ala. 328.

<sup>12</sup> *Gordon v. State*, 4 Kan. 489.

<sup>13</sup> *Counce v. Persons Unknown*, 76 Me. 548; *Comp. post*, § 77.

<sup>14</sup> *Coxe v. Martin*, 44 Pa. St. 322.

and so is a writ of assistance with fieri facias for costs.<sup>15</sup> But a landlord's distress warrant is not "process" within the meaning of the act making the obstruction of process as indictable offence.<sup>16</sup> A provision abolishing imprisonment for debt does not prohibit commitments under attachment for failure to comply with an order of the court.<sup>17</sup> And where a statute authorizes a criminal prosecution to be instituted on complaint, the technical meaning of that term implies a complaint under oath or affirmation;<sup>18</sup> and the requirement of service of a notice means personal service unless otherwise specified.<sup>19</sup>

§ 75. [But the rule giving to a word its technical meaning holds equally good in the construction of statutes dealing with other subjects as to which words and phrases used in a statute have acquired such a meaning, whether it be a legal technical meaning or not; *i. e.*, whether it be a technical meaning which the word or phrase has acquired in the law, or a technical meaning which it has acquired in any other science, art, or business, if the enactment relates to any of these, the technical meaning the word has in the law, in any other science, in any art, or in any business is to be given to it, accordingly as the one or the other is the subject of the enactment.

[It has already been seen,<sup>20</sup> that a word which has a settled common law meaning, when used in an act upon the subject-matter as to which it has acquired such meaning, is to be so understood. So, in dealing with criminal or penal matters, the statute is presumed to use its language with reference to the ascertained meaning of the language of the criminal law. The word *steal* thus implies simple larceny,<sup>21</sup> the word *murder* malice aforethought,<sup>22</sup> and the word *robbery* its technical significance.<sup>23</sup> An act declaring that "all

<sup>15</sup> Clark v. Martin, 3 Grant (Pa.) 393.

<sup>16</sup> Com'th v. Leech, 27 Pitts. L. J. (Pa.) 233.

<sup>17</sup> Wood v. Wood, Phill. L. (N. C.) 538. Compare ante, § 14, Pierce's App., 102 Pa. St. 27.

<sup>18</sup> Campbell v. Thompson, 18 Me. 117.

<sup>19</sup> Ruthbun v. Acker, 18 Barb. (N. Y.) 393.

<sup>20</sup> Ante, § 3.

<sup>21</sup> Alexander v. State, 12 Tex. 540.

<sup>22</sup> State v. Phelps, 24 La. An. 493.

<sup>23</sup> U. S. v. Jones, 3 Wash. 209.

joint obligations and covenants shall hereafter be taken and held to be joint and several obligations and covenants," was, because of the technical sense of the word *obligation*, when used with reference to the contract itself, not the duty or liability arising thereon,<sup>24</sup> held not to include oral ones.<sup>25</sup> Similarly the word *purchaser*, having a well-defined technical meaning, including every holder of the legal title to real and personal property where such title was acquired by deed, was, when used in a statute, held to embrace a mortgagee.<sup>26</sup> And, upon the same ground of technical meaning, the same words were declared not to include a judgment creditor, under the Pennsylvania recording act protecting certain purchasers and mortgagees against unrecorded mortgages.<sup>27</sup> Again, under the Pennsylvania married women's act of 1848, which declared that the property of such married woman should be her "sole and separate" property, free from the control of her husband, etc., it was decided, that, in conformity with the accepted technical meaning of that phrase, the proper construction of the act was to make the property of a married woman hers in all respects as if settled to her sole and separate use, and that the rules of law governing such estates in equity were thereafter to be applied to the legal estates of married women under the statute.<sup>28</sup> Again, under an act prohibiting preferences of creditors in assignments for the benefit of creditors, it was decided that a mortgage for the benefit of creditors was not included, an assignment importing an absolute transfer.<sup>29</sup>

<sup>24</sup> See *Crandall v. Bryan*, 15 How. Pr. (N. Y.) 56, as to incurring an *obligation* by fraud.

<sup>25</sup> *Exch. B'k v. Ford*, 7 Col. 314, cit. *Sturgis v. Cowinshield*, 4 Wheat. 193; *Gage v. Bank*, 17 Ill. 62; *Strong v. Wheaton*, 38 Barb. (N. Y.) 616; *Barker v. Cassidy*, 16 Id. 184; *Rippon's Ex'rs. v. Townsend's Ex'rs* 1 Bay (S. C.) 445; *Gale v. Myers*, 4 Houst. (Del.) 546.

<sup>26</sup> *Halbert v. McCulloch*, 3 Metc. (Ky.) 456; a mortgagee being a purchaser within the statute of *Elizabeth*: *Bond v. Bunting*, 78 Pa. St. 210, 219.

<sup>27</sup> *Rodgers v. Gibson*, 4 Yeates Pa.) 111; (it being, however, also

stated that no purpose could be discovered from the act, its objects or preamble, to protect judgment creditors;) *Hiester v. Fortner*, 2 Binn. (Pa.) 40; *Cover v. Black*, 1 Pa. St. 493; *Stewart v. Freeman*, 22 Id. 123.

<sup>28</sup> *Bear's Adm'r v. Bear*, 33 Pa. St. 525; *Pettit v. Fretz's Ex'r*, Id. 118. Compare, however, *Emmert v. Hays*, 89 Ill. 11, where it was held the phrase "separate estates," as used in the Illinois married woman's act, Rev. Stat. 1845, ch. 109, was to be understood in a broader and more popular sense.

<sup>29</sup> *Johnson's App.*, 103 Pa. St. 373.

And under an act which provided that, where a person was accused of a *crime* and the charge found unsustained, the county, not the defendant, should pay the costs, the common usage of the word "crimes" as denoting offences of a deeper and more atrocious dye, whilst comprising smaller offenses under the general name of misdemeanors, was rejected in favor of the more technical interpretation whereby crimes and misdemeanors are to be understood as synonymous, denoting offenses short of felony." So the word "property," as applied to lands, includes every species of title, inchoate and complete, and embraces rights lying in contract, executory as well as executed." An act, which, while permitting the construction of a causal, gave damages (taking into consideration the advantages) from its location, to the owner of lands "by interfering in any manner with his *rights of property*," was held to authorize the recovery of consequential damages resulting from the backing of water upon his land, although no part of the latter was actually taken." And an act of assembly releasing the rights of the Commonwealth to certain property, and declaring the estate conveyed by a certain deed effectual, notwithstanding the grantee was a foreign corporation, was held to be a conveyance by matter of "record" to the exclusion of the vendor's subsequent attaching or judgment creditors." So a turnpike road, laid out under a legislative charter forfeited by the turnpike company, and used by the public is a

<sup>20</sup> Lehigh Co. v. Shock, 113 Pa. St. 373, 379.

<sup>21</sup> Figg v. Snook, 9 Ind. 202. An action for damages for malicious prosecution, before judgment, was held not to be "property" within exemption law: Hopkins v. Fogler, 60 Me. 266. But in Stevenson v. Morris, 37 Ohio St. 10, a right of action for assault and battery was held to be "property." And see Chicago, etc., R. R. Co. v. Dunn, 52 Ill. 260. As applied to personality in a taxing act, "property" was held to include credits: People v. Worthington, 21 Ill. 171. Money was held to be property within a statute against stealing: People v. Williams, 24 Mich. 156. But see McIntyre v.

Ingraham, 35 Miss. 25, for a dictum to the effect that "personal property" does not strictly include promissory notes. Comp. Engel v. State, 65 Md. 539, that it includes choses in action. "Any . . . commodity whatever" was held to embrace every species of personal property, in Barnett v. Powell, Litt. Sel. Cas. (Ky.) 409. The word "stock," in North Carolina act, 1796, was construed in the sense commonly accepted, and excluding other perishable goods: Van Noorden v. Prin, 2 Hayw. (N. C.) 149.

<sup>22</sup> Com'th v. Snyder, 2 Watts (Pa.) 418.

<sup>23</sup> Caverow v. Ins. Co., 53 Pa. St. 287.



*public road* within the meaning of an act requiring a railroad company taking a public road to construct another.<sup>34</sup> And the word "country," in revenue laws, according to its established meaning in legislative and departmental practice, embraces all the possessions of a foreign state which are subject to the same supreme executive and legislative control.<sup>35</sup> Upon the same principle, the word "army" in acts of congress does not include the navy or the marine corps;<sup>36</sup> and the term "supersede" in the Massachusetts militia act was construed with reference to the technical meaning in which it is used in military affairs.<sup>37</sup>

§ 76. **Popular Meaning.**—But in general, statutes are presumed to use words in their popular sense; *uti loquitur vulgus* (a). [Hence the technical] meaning is rejected, as soon as the judicial mind is satisfied that another is more agreeable to the object and intention. (b) Thus the 38 Geo. 3, c. 5 and c. 60, which exempted "hospitals" from the land tax, was construed as applying to all establishments popularly known by that designation, and even as extending to an asylum for orphans (c); when it appeared more consonant to the object of the Act to give it that wider meaning, than to restrict it to what are alone "hospitals"

<sup>34</sup> *Pittsb., etc., R. R. Co. v. Com'th*, 104 Pa. St. 583. The forfeiture of the company's charter destroyed the rights of the corporation; but the road, being a public highway as a turnpike: *Nor. Centr. R. R. Co. v. Com'th*, 90 Id. 300, remained, in fact and in law, a public highway: *Pittsb., etc. R. R. Co. v. Com'th*, *supra*, *cit.* *Craig v. People*, 47 Ill. 495.

<sup>35</sup> *Stairs v. Peaslee*, 18 How. 521.

<sup>36</sup> *Re Bailey*, 2 Sawyer, 200.

<sup>37</sup> *Exp. Hall*, 1 Pick. (Mass.) 261. The phrase "shall go," in a statute declaring the rights of a husband and wife to property held in common, upon the death of either, was construed "shall vest:" *Broad v. Broad*, 40 Cal. 493.

(a) *The Fusilier*, 34 L. J. P. M. & A. 27, *per Dr. Lushington*. [And see, to same effect: *Maillard v. Lawrence*, 16 How. 251; *Schrifer v. Wood*, 5 Blatchf. 215; *U. S. v.*

*Clayton*, 2 Dill. 219; *Favers v. Glass*, 22 Ala. 621; *Mayor of Wintumpka v. Winter*, 29 Ala. 651; *School Dir's v. Bank*, 8 Watts. (Pa.) 350; *P. & R. R. Co., v. Catawissa, etc.*, *R. R. Co.* 53 Pa. St. 20; *Fox's App.*, 112 Id. 337, 351; *Quigley v. Gorham*, 5 Cal. 418; *Parkinson v. State*, 14 Md. 184; *Allen v. Ins. Co.*, 2 Id. 111; *Engelking v. Von Wamel*, 26 Tex. 469; and see *ante*, § 2, and cases in note 5.]

(b) *Per Lord Wensleydale* in *Ready v. Fitzgerald*, 6 H. L. 877. See also *Towns v. Wentworth*, 11 Moo. 543. [In construing a statute of limitations, the phrase "any article charged in a store-account," was held to apply to wholesale and retail store-accounts: *Solomon v. Co-op. Co.*, 21 Fla. 374.]

(c) *Colchester v. Kewney*, L. R. 2 Ex. 363. See *R. v. Manchester*, 4 B. & A. 504.

in the strict legal sense of the term, that is, eleemosynary institutions in which the persons benefited form a corporate body (*a*). An Act which privileged a bankrupt from arrest for "debt" was, on the same principle, extended to arrest for non-payment of money ordered to be paid by an order of the Court of Chancery, or by a rule of a common-law court, though technically not constituting a debt (*b*); and the primarily technical term "purchaser," was understood to be used in the Bankruptcy Act, in the popular sense of buyer (*c*). [So, under the Pennsylvania statute, under which an attachment execution will not lie for a demand founded in tort, as for the detention of chattels, but only for a debt arising from contract, express or implied, it was held that money deposited for a certain use, if not so used, is a "debt due" the depositor;<sup>38</sup> and under a Connecticut statute authorizing foreign attachment "where a debt is *due* from any person," etc., it was held the word "due" was not to be understood in the restricted sense of "payable," although there must be an existing indebtedness.<sup>39</sup>] So, when it was enacted (5 & 6 W. 4, c. 54), that marriages already celebrated between persons within prohibited degrees should not be annulled for that cause, unless by sentence pronounced in a suit then "depending;" it was held that this last word was to be understood in a popular and not technical sense, and that a suit was "depending" as soon as the citation had been issued (*d*) [And under a statute providing that the repeal of a statute should not affect "pending action, prosecutions, or proceedings," it was held that a prosecution was

(*a*) Sutton's Case, 10 Rep. 31a.

(*b*) Exp. Williams, 1 Sch. & Lef. 169; R. v. Edwards, 9 B. & C. 652; R. v. Dunne, 2 M. & S. 201; Lees v. Newton, L. R. 1 C. P. 658. Comp. Bancroft v. Mitchell, L. R. 2 Q. B. 549; Drover v. Beyer, 13 Ch. D. 242, 49 L. J. 37; Exp. Muirhead, 2 Ch. D. 22; Patterson v. Patterson, L. R. 2 P. & M. 189; Dolphin v. Layton, 4 C. P. D. 130. Comp. also under the stat. of set-off, Remington v. Stevens, 2 Stra. 1271; Francis v. Dodsworth, 4 C. B. 220, *per* Wilde, C.J.; Rawley v. Rawley, 1 Q. B. D. 460; and see

Jones v. Thompson, E. B. & E. 63; 27 L. J. 234; Dresser v. Jones, 6 C. B. N. S. 429; Richardson v. Hunt, 2 C. B. D. 9; Hall v. Pritchett, 3 Q. B. D. 215, 77 L. J. 15; Exp. Jones, 18 Ch. D. 109.

(*c*) Exp. Hillman, 10 Ch. D. 622. Comp. ante, § 75.

<sup>38</sup> Balliet v. Brown, 103 Pa. St. 546.

<sup>39</sup> File Sharpening Co. v. Parsons, 54 Conn. 810.

(*d*) Sherwood v. Ray, 1 Moo. P. C. 353. See Ditcher v. Denison, 11 Moo. P. C. 324; R. v. Brooks, 2 C. & K. 402.

"pending" as soon as the criminal was arrested and committed.<sup>40</sup>] An Act which authorized the Court before which a road indictment was "preferred," to give the prosecutor costs, was held to authorize the judge to give them, who tried the indictment at *Nisi Prius* after its removal into the Queen's Bench (a); for the technical meaning of the word "preferred," would have rendered the Act nugatory in a large majority of cases, road indictments being rarely tried at the Assizes at which they are "preferred" (b): and where the construction according to the technical sense would make a statute inoperative, whilst giving it its common significance would secure to it a reasonable operation, the latter construction is always to be adopted.<sup>41</sup> Thus, under an act which declared "that all real estate situate in P. owned and possessed by any railroad company, shall be . . . subject to taxation for city purposes, the same as other real estate in said city," was held, not only to include street railway companies, but to embrace the lands, buildings and improvements of railroad companies, though essential to the exercise of the franchise, notwithstanding such property is technically personalty.<sup>42</sup> Any other construction would have made the provision referred to practically nugatory.<sup>43</sup>]

§ 77. Where judgment was "recovered" for 500*l.* on a warrant of attorney to secure an annuity of 30*l.*, of which only 15*l.* were due, it was held that the defendant was protected from arrest by the enactment that no person should be taken in execution on a judgment "where the sum recovered does not exceed 20*l.*" Though technically the judgment was "recovered" for the larger sum, the sum really recovered was under 20*l.* (a). The Railway Clauses

<sup>40</sup> *Hartnett v. State*, 42 Ohio St. 568. But see *State v. Arlin*, 39 N. H. 179, that a prosecution was not "pending" within the meaning of the act 27 June, 1859, changing the punishment, where no indictment had been found, but only preliminary proceedings instituted before a magistrate.

(a) *R. v. Pembridge*, 3 Q. B. 901; *R. v. Preston*, 7 Dowl. 593; and see *R. v. Papworth*, 2 East, 413; *R. v. Ipstones*, 2 Q. B. 216.

(b) *Per Coleridge, J.*, 3 Q.B. 906.

<sup>41</sup> *Robinson v. Varnell*, 16 Tex. 382; and see *Bish., Wr. Laws*, § 100.

<sup>42</sup> *Pa. R. R. Co. v. Pittsburgh*, 104 Pa. St. 522.

<sup>43</sup> But see the very excellent dissenting opinion in the above case by Mr. Justice Green, in which Mr. Justice Paxson concurred.

(c) 7 & 8 Vict. c. 96, s. 5; *Johnson v. Harris*, 15 C. B. 357: 24 L. J. 40.

Consolidation Act, 1845, which, while giving companies power to take land for temporary purposes, provided that they should not be exempted from "an action" for nuisance or other injury, was construed as not limited to what were technically "actions,"<sup>44</sup> but included all proceedings whether at law or in equity (a). [Indeed, the word "actions" in a statute is generally held to embrace suits at law and in equity;<sup>45</sup> and such is said to be in general the effect even of the phrase "at law."<sup>46</sup> Under an act providing, that, if in any actions or suits judgment should be given for plaintiff and afterwards reversed, plaintiff might commence a new action or suit within one year from the reversal, a suit by motion was held included.<sup>47</sup> So proceedings in the Orphans' Court were held to be within the meaning of the word "actions" as used in an act relating to the competency of parties to actions to testify therein.<sup>48</sup> And] where the Quarter Sessions were empowered to order "the party against whom an appeal was decided," to pay the costs of the successful party; it was held that the prosecutor who had procured the conviction successfully appealed against, was for this purpose the party appealed against, though he was not so on the record, or formally, nor even by being served with notice of the appeal (b). The convicting justices were not the parties appealed against, though the Act required that the notice of appeal should be served on them. The word "party" has even received the sense in which it is sometimes vulgarly used, of "person," when it is plain that Parliament so intended it; as in the Chancery

<sup>44</sup> *I. e.*, suits at law : *McPike v. McPike*, 10 Ill. App. 333.

(a) 8 Vict. c. 20, s. 32; *Fenwick v. East London R. Co.*, L. R. 20 Eq. 544; and see *Walker v. Clements*, 15 Q. B. 1046; *Rawley v. Rawley*, 1 Q. B. D. 460.

<sup>45</sup> *Corton v. Ball*, 4 Barb. (N. Y.) 452; *Lux v. Haggin*, 69 Cal. 255; *Coatsworth v. Barr*, 11 Mich. 199.

<sup>46</sup> *Fleming v. Burgin*, 2 Ired. Eq. (N. C.) 584.

<sup>47</sup> *Lansdale v. Cox*, 7 J. J. Marsh. (Ky.) 391. And see *Calderwood v. Calderwood* 38 Vt. 171, where, in an act providing that interest shall

not disqualify a witness, the words "suit or proceeding at law"—in the proviso to that section the word "action,"—and in another statute in part materia the word "suit," being used in reference to the same subject matter, were all held to be substantially synonymous. Compare ante, § 74.

<sup>48</sup> *McBride's App.*, 72 Pa. St. 480; *Gyger's App.*, 74 Id. 48; *Taylor v. Kelly*, 80 Id. 95.

(b) *R. v. Hants*, 1 B. & Ad. 654; *R. v. Purdey*, 34 L. J. M. C. 4; 5 B. & S. 909. See *R. v. Bradlaugh*, 2 & 3 Q. B. D. & 47 & 48 L. J.

Amendment Act of 1852, which enacted that any "party" who made an affidavit in a suit should be liable to cross-examination (a). [And, whilst, in a statute regulating applications for change of venue, the term "party" was held to signify all the plaintiffs, or all the defendants in an action, in a statute relating to the challenging of jurors, each of the several defendants, acting upon separate defences, is to be deemed a "party."<sup>49</sup>] The 17 Geo. 3, c. 26, which, after requiring the registration of annuities, to check, as the preamble states, the pernicious practice of raising money by the sale of life annuities, except annuities charged on lands whereof the grantor is "seized in fee simple or fee tail in possession," was construed as including in this exception a person who was tenant for life with a general power of appointment; for such a person, though not technically a tenant in fee simple, is substantially so, since he is the absolute owner of the property (b). Although the word "children" is confined technically to legitimate children (c) it would be construed as including illegitimate children, when such seemed to be more consonant to the intention. Thus, the Marriage Act, 26 Geo. 2, c. 33, which declared void the marriage of minors without the consent of their parents or guardians, was held to apply to illegitimate children, since clandestine marriages by them were within the mischief which it was the object to remedy (d); and the 4 & 5 Ph. & M. c. 8, s. 3, which made it penal to take an unmarried girl under sixteen from the possession of her parents, against their will, was held to apply to the taking of a natural daughter from her putative father (e).

(a) 15 & 16 Vict. c. 86, s. 40; *Re Quartz Hill Co.*, 21 Ch. D. 642.

<sup>49</sup> *Rupp v. Swineford*, 40 Wis. 28.

(b) *Halsey v. Hales*, 3 T. R. 194. *Comp. Leach v. Jay*, L. R. 9 Ch. D. 42, 47 L. J. 876. [A voluntary allowance granted by the Secretary of State, for India, to an officer of the Indian army on his compulsory retirement, to which the recipient has no claim, and which may be withdrawn at the discretion of the Secretary, was, in *Exp. Webber*, L. R. 18 Q. B. D. 111, held not to be "income" within

the meaning of the bankruptcy act so as to authorize an order compelling its payment to the trustee.]

(c) *R. v. Helton*, Burr. S. C. 187, 2 Stra. 1168; *R. v. Birmingham*, 8 Q. B. 410; *R. v. Maude*, 2 Dowl. N. S. 58; *Simmons v. Crook*, L. R. 6 H. L. 265. [Technically "next of kin" includes only legitimate persons: *McCool v. Smith*, 1 Black 459.]

(d) *R. v. Hodnett*, 1 T. R. 96; and see *R. v. St. Giles*, 11 Q. B. 173; *R. v. Brighton*, 1 B. & S. 447, 30 L. J. M. C. 197.

(e) *R. v. Cornforth*, 2 Stra. 1162.

[And so the words, "inherit," "heirs," "joint heir," in a statute, were construed to embrace illegitimate children."

§ 78. **Ordinary Meaning Preferred.**—[Indeed, it is probably not inaccurate to say that, as between two meanings of a word, the ordinary and popular meaning is, in general, to be preferred,<sup>51</sup> and is most frequently in harmony with the subject matter and object of the enactment. A few additional illustrations will suffice to elucidate this subject. Thus the word "state," in an act of Congress may include a territory;<sup>52</sup> and in a state statute of limitations, the phrase "beyond seas," borrowed from the English law, has been construed to mean "out of the state;"<sup>53</sup> whilst in Pennsylvania it has been held to mean "out of the limits of the United States," the saving of a right of action in favor of persons beyond seas being considered intended to operate in favor of persons in a foreign country, not of citizens of another state, who are under a common government, and, by the provisions of the federal constitution, entitled to the privileges of citizens of the several states.<sup>54</sup> Under an act providing, that, to enable a mechanic or other person furnishing material or performing labor to a contractor, to acquire a mechanic's lien, he must at or before the time he furnishes the material or performs the labor, notify the owner or his agent," etc., it was held that a verbal notification was all that could be required, such being the general significance of the word "notify."<sup>55</sup>

§ 79. [A township in Pennsylvania being unable to

Comp. Dorin v. Dorin, L. R. 7 H. L. 568; Dickinson v. N. E. R. Co., 2 H. & C. 735, 33 L. J. 91; Re Wright, 2 K. & J. 595.

<sup>50</sup> Swanson v. Swanson, 2 Swan. Tenn. 446.

<sup>51</sup> See Schriber v. Wood, 5 Blatchf. 215; Mayor of Wetumpka v. Winter, 29 Ala. 651; Gyger's Est., 65 Pa. St. 311; Parkinson v. State, 14 Md. 184; and cases in notes to §§ 2, 76.

<sup>52</sup> Re Bryant, Deady, 118.

<sup>53</sup> Murray v. Baker, 3 Wheat. 541; Shelby v. Guy, 11 Id. 361; Bank of Alexandria v. Dyer, 14 Pet. 141; Faw v. Roberdeau, 3 Cranch, 174; Ruggles v. Keeler, 3 Johns. (N. Y.) 263; Galusha v.

Cobleigh, 13 N. H. 79; Pancoast v. Addison, 1 H. & J. (Md.) 330; Richardson v. Richardson, 6 Ohio, 125; West v. Pickelsmer, 7 Id. P. ii, 235; Stephenson v. Doe, 8 Blackf. (Ind.) 508; Forbes v. Foot, 2 McCord (S. C.) 331; Johnston v. White, T. U. P. Charl. (Ga.) 140; Denham v. Holeman, 26 Ga. 182; Field v. Dickenson, 3 Ark. 409; Wakefield v. Smart, 8 Id. 488.

<sup>54</sup> Ward v. Hallam, 2 Dall. (Pa.) 217; 1 Yeates, 329; Thurston v. Fisher, 9 S. & R. (Pa.) 288; Kline v. Kline, 20 Pa. St. 503; Gonder v. Estabrook, 33 Id. 374.

<sup>55</sup> Vinton v. Builders, &c., Ass'n, 109 Ind. 351. See ante, § 35.

procure volunteers under the Bounty law of 1864 for \$300, the citizens voluntarily advanced money to pay bounties beyond that amount, with the understanding that it was to be repaid when an act should be passed authorizing taxation to repay the same. An act was passed, in 1865, authorizing taxation to repay all "loans made in good faith," and it was held that the term "loans" should be construed, not in its technical sense, as "debts contracted by persons authorized to borrow the money and make the township responsible," but as having reference to all claims upon the conscience and moral sense of the community relieved by the contribution referred to.<sup>56</sup> So it was held to be no objection to the defense of usury, in New Jersey, that the mortgage sought to be foreclosed was given in part of the purchase money, and not for a technical loan or lending.<sup>57</sup> The phrase "legal representatives," in an act relating to land was construed as synonymous (as, in popular usage, it may be said to be,) with "heirs and assigns."<sup>58</sup> The word "connection"<sup>59</sup> as applied to societies, is held to mean any relation, organic or conventional, by which one society is linked or united to another.<sup>60</sup> As applied to railways its common and popular significance is such an arrangement that freight and passengers can be conveniently passed from one to the other by transition of cars or otherwise.<sup>61</sup> And a "branch railroad," authorized by an act to be built, was held to include a short elevated railroad from the terminus of the main railway to another point.<sup>62</sup> The phrase "laying out" as used in a statute relating to highways, includes not only the initiatory act of laying out the road by the selectmen, but also the acceptance of the survey by the town and the recording thereof;<sup>63</sup> and in an act

<sup>56</sup> *Weister v. Hade*, 52 Pa. St. 474. See ante, § 76.

<sup>57</sup> *Diercks v. Kennedy*, 16 N. J. Eq. 210.

<sup>58</sup> *Com'th v. Bryan*, 6 Serg. & R. (Pa.) 81. See also *Duncan v. Walker*, 2 Dall. (Pa.) 205. *Comp. Warnecke v. Lembea*, 71 Ill. 91, that legal or personal representatives may mean heirs, next of kin, descendants.

<sup>59</sup> 1 Mich. Comp. L., § 2032.

<sup>60</sup> *Allison v. Smith*, 16 Mich. 405.

<sup>61</sup> *P. & R. R. Co. v. Catawissa, &c., R. R. Co.* 53 Pa. St. 20.

<sup>62</sup> *McAboy's App.*, 107 Pa. St. 548.

<sup>63</sup> *Wolcott v. Pond*, 19 Conn. 597. This interpretation was put on the ground of liberal construction of a remedial and publicly beneficial act.

allowing a bounty to "any person liable to draft," who should furnish, etc., a substitute, the phrase "liable to draft" was held to refer to the whole process of drafting, not merely to the drawing of the name from the wheel, and to apply, not only to enrolled men, not yet drawn, but to drafted men as well.<sup>64</sup> So, a "bridge" includes the necessary abutments.<sup>65</sup> And in its popular sense a bridge is viewed as the means for passage of persons, cattle, etc., so that a prohibition in a grant to a bridge company against the building of a bridge within a mile of the toll bridge provided for in the charter was held not to include a railroad bridge,<sup>66</sup> and a statute making "all bridge structures" across any navigable stream forming the boundary of the state assessable as real estate in the county where located was held inapplicable to bridges constituting a railroad track exclusively.<sup>67</sup> A barn, not connected with the mansion house, but standing alone, several rods distant from it, may be an outhouse,<sup>68</sup> and one standing eighty feet from the dwelling house, in a yard or lawn between which and the house there was communication by a pair of bars, may be embraced under the term "curtilage,"<sup>69</sup> within the meaning of an act, its object and subject matter. The term "misdemeanor" in Wisconsin, Acts 1860, ch. 196, was held not to denote a criminal offence, but a trespass by the sheriff in his official capacity.<sup>70</sup> An act enabling married women to acquire land by "grant," includes a power to purchase by deed of bargain and sale.<sup>71</sup> The word "destroy," in an act of Congress punishing with death a person destroying a vessel, means to unfit her for service, beyond the hopes of

<sup>64</sup> Gregg Tp. v. Jamison, 55 Pa. St. 468.

<sup>65</sup> Tolland v. Willington, 26 Conn. 578. And see Linton v. Sharpsburg Bridge, 1 Grant (Pa.) 414.

<sup>66</sup> Lake v. R. R. Co., 7 Nev. 294; Bridge Co. v. Hoboken, etc., Co., 13 N. J. Eq. 81; S. C., 1 Wall. 116.

<sup>67</sup> Anderson v. R. R. Co., 117 Ill. 26; and it was deemed immaterial, as effecting this question, that such bridge was built by the company in excess of its powers:

Ibid.

<sup>68</sup> State v. Brooks, 4 Conn. 446.

<sup>69</sup> People v. Taylor, 2 Mich. 250.

<sup>70</sup> State v. Mann, 21 Wis. 684.

<sup>71</sup> McVey v. Ry. Co., 42 Wis. 532. The word "grant" is not a technical word, like, *e. g.*, "enfeoff" and may import a grant of a naked power, as well as of an interest or title: Rice v. R. R. Co., 1 Black, 358. As to effect of the word "gift" as including conveyance for consideration, see Chapman v. Miller, 128 Mass. 269.



recovery, by ordinary means, and includes casting away."<sup>72</sup> Nor are "prize and capture" limited to captures at sea."<sup>73</sup>

§ 80. ["Sittings," in the Oregon territorial act of 10 Dec., 1850, were held to mean "term."<sup>74</sup> "Children," in a statute of distributions, aiming at the equal division of an intestate's estate, will include grand-children, so as not to disinherit the offspring of a deceased child;<sup>75</sup> while the "ancestor from whom the estate came" has been held to mean the next ancestor.<sup>76</sup> A bank discounting a note, whilst not technically or literally the assignee of the note, is such nevertheless within the meaning of a statute excepting, from its provision removing the incompetency to testify on the score of interest, the case in which the assignor of the contract or thing in action is deceased, so as to leave its stockholders under disability where the maker of the note has died." Under an act which provides that the words "grant, bargain and sell," in a deed, are to be construed as a covenant of seisin, of quiet enjoyment, and against *incumbrances*, only such incumbrances are intended as affect the title, not such as affect the physical condition of the land, as roads and the like.<sup>77</sup> So, in ordinary parlance, there is a distinction between "sell" and "give," which will be regarded in the construction of those words in a statute; the former meaning a transfer for a valuable consideration, the latter a gratuitous transfer, without any equivalent." Again, the provision, in an act, invalidating all bequests, etc., made to charities within one calendar month of the donor's death, relates only to the physical act of executing the deed or will, and not to the date from which, for certain purposes and in the fiction of the law, the will is presumed to speak; so that the addition, within one calendar month of the testator's death, of a codicil to a will executed more than one calendar month before that event, diminishing such a

<sup>72</sup> U. S. v. Johns, 1 Wash. 363; 4 Dall. 412.

<sup>73</sup> U. S. v. Athens Armory, 2 Abb. U. S. 305.

<sup>74</sup> Gird v. State, 1 Oreg. 308.

<sup>75</sup> Eshelman's App., 74 Pa. St. 46.

<sup>76</sup> Clayton v. Drake, 17 Ohio St. 367. See same case upon construc-

tion of "next of kin" as excluding representation.

<sup>77</sup> Foster v. Collner, 107 Pa. St. 305.

<sup>78</sup> Memmert v. McKeen, 112 Pa. St. 316. Compare Stambaugh v. Smith, 23 Ohio St. 584.

<sup>79</sup> Parkinson v. State, 14 Md. 184.

bequest made therein and otherwise disposing of certain portions of the estate, will not invalidate the gift, upon any theory of constructive republication.<sup>80</sup> Similarly, a child born out of lawful wedlock before the date of the father's will, but rendered legitimate, by the force of a general statute, by the subsequent marriage of its parents after the date of the will, is not an after-born child within the meaning of an earlier act which provides, that, where a person, having made a will, afterwards marries and has children not provided for in said will, and dies leaving a widow or child, he shall, so far as regards the widow or after-born children, be deemed to die intestate, this provision, according to its plain and unambiguous meaning, referring to physical birth, not legislative legitimation, after making the will.<sup>81</sup> Thus, too, the employment of a person in the United States service, with the rank of colonel, the employment not being in a military capacity, will not entitle him to a pension under act of 1832.<sup>82</sup> Perhaps more than in any other case, "where particular terms are used to describe objects of taxation, they should be construed according to their popular acceptation, not by any refined or strained analogies, and especially where that acceptation corresponds with the use of those terms in recent legislation ;"<sup>83</sup> so that a statute imposing a tax upon ground rents does not authorize a tax on a widow's interest in land secured to her in a proceeding in partition where the eldest son accepts, although her interest is in the nature of a rent charge.<sup>84</sup>

§ 81. **Rules of Grammar.**—[As the technical construction of the words themselves may have to give way to a more artificial interpretation, so the technical rules of grammar may, in the construction of sentences, be overridden by a more common-sense reading, based upon consideration of

<sup>80</sup> Carl's App., 106 Pa. St. 635. The act refers to the signing and attesting as the acts which are to precede death by at least one calendar month ; and, if the construction above stated were not correct, there could be no charitable bequest at all, where, by statute, the will is declared to speak as

from the testator's death : *Ib.* at p. 642.

<sup>81</sup> McCulloch's App., 113 Pa. St. 247.

<sup>82</sup> *Ansart v. U. S.*, 15 Leg. Int. 318. See post, § 90, note 131.

<sup>83</sup> *Deitz v. Beard*, 2 Watts (Pa.) 170.

<sup>84</sup> *Ib.*

the object and subject matter of the act, than could result from their strict application. "The grammatical construction of a statute is one mode of interpretation. But it is not the only mode, and it is not always the true mode. We may assume that the draftsman of an act understood the rules of grammar, but it is not always safe to do so."<sup>85</sup> Thus, where an act prescribed that the Register should issue letters of administration to the widow, if any, or to such of the relations or kindred of the decedent as by law might be entitled to the residue of the estate, etc., and then proceeded: "or he may join with the widow in the administration such relation or kindred . . . as he shall judge will best administer the estate, preferring always, of those so entitled, such as are in the nearest degree of consanguinity with the decedent," etc., it was held that the phrase "preferring always," etc., applied not only to the joint administration with the widow, but also to cases where there was no widow, or where she renounced; *i. e.*, to the first clause, as well as to the second, separated from the former by a semi-colon, although, it was intimated, the rule of strict grammatical construction would have applied the phrase in question to the last clause only.<sup>86</sup>

§ 82. [So, the use of the future tense in a statute does not necessarily prevent it from having a present operation. An act of Congress directing that certain lands "shall be given" to certain persons, was construed as an absolute donation and as conferring a present right upon the beneficiaries.<sup>87</sup> The description in a statute of a cause of action, "if any damage shall happen," does not obviate the application of the act to an existing case stated, if such an intention otherwise appears.<sup>88</sup> The phrase "who shall come" into the state, was construed to include a married woman who had already come into the state when the act was passed.<sup>89</sup>

<sup>85</sup> *Fisher v. Connard*, 100 Pa. St. 63, 69, *per Paxson, J.*

<sup>86</sup> *Gyger's Est.*, 65 Pa. St. 311 (where, also, the word "always" was held to mean "in all cases"). Compare post, §§ 414-415.

<sup>87</sup> *Rutherford v. Greene*, 2 Wheat. 196.

<sup>88</sup> *Ludington v. U. S.*, 15 Ct. of Cl. 453.

<sup>89</sup> *Maysville, etc., R. R. Co v. Herrick*, 13 Bush. (Ky.) 122.

[Conversely, when an act declared a forfeiture of dower or curtesy "whenever a married man shall be deserted by his wife, or a married woman by her husband, for the space of one year," it was given only a prospective operation, applying to cases of desertion beginning after the statute took effect.<sup>90</sup> And where an act, not going into effect until a future day, declared certain results in all cases in which certain things "shall have been done," it was held applicable only to cases arising after the date when the act was to become operative.<sup>91</sup>

§ 83. *Commercial, etc., Terms.*—[A statute applicable to a large trade or business should, if possible, be construed, not according to the strictest and nicest interpretation of the language, but according to a reasonable and business interpretation of it, with regard to the trade or business with which it is dealing.<sup>92</sup>] In a Custom's Act, which imposes duties on imported commodities, the articles specified would generally be understood in their known commercial sense (*a*). [Such laws are intended for practical use and application by men engaged in commerce.] They "tax things by their common and usual denominations among the people, and not according to their denominations among naturalists, or botanists, or men in science."<sup>93</sup> Hence the designation of an article of commerce by merchants and importers, when it is clearly established, determines the construction of a tariff law in which that article is mentioned.<sup>94</sup> Thus, "Bohea" tea was understood to mean, not the pure and unadulterated article to which the name strictly belongs, and which alone is known by it in China; but all teas usually bought and sold at home as Bohea (*b*). [And under a statute imposing

<sup>90</sup> *Giles v. Giles*, 22 Minn. 348.

<sup>91</sup> *Dewart v. Purdy*, 29 Pa. St. 113. As to the class of cases of construction falling, as these did, under the presumption against retrospective operation, see this subject, post, §§ 271 et seq.

<sup>92</sup> *The Dancelm*, L. R. 9 P. D. 171, per Brett, M. R.

(*a*) *Atty-Gen. v. Bailey*, 1 Ex. 281; *Elliott v. Swartwout*, 10 Peters, 137. [*Roosevelt v. Maxwell*, 3 Blatchf. 391. Comp. ante,

§ 80, *Deitz v. Beard*, 2 W. (Pa.) 170.]

<sup>93</sup> *Elliott v. Swartwout*, 10 Pet. 137.

<sup>94</sup> *U. S. v. Breed*, 1 Sumn. 159, per Story, J., at p. 164.

<sup>95</sup> *Arthur v. Morrison*, 96 U. S. 108. See also *Curtis v. Martin*, 3 How. 106.

(*b*) Two hundred chests of tea, 9 Wheat. 430; "Gin," *Webb v. Knight*, 2 Q. B. D. 530; "Spirits," *Atty-Gen. v. Bailey*, 1 Ex. 281;

a certain duty upon "silk veils," etc., and another upon "manufactures of silk," etc., not covered by former enumerations, it was held that "crape veils" were included in the latter, and not in the former, although admittedly manufactured entirely of silk."

[The rule, however, works both ways; and whilst it includes what is commonly covered by the commercial sense of the term, it excludes what is not so covered. Thus it was held, that, in order to permit the entry of a certain article under a certain denomination, it must have been previously known by that name in commerce." And the rule is subject to this limitation, that, if it appears that the Legislature intended something different from the usual meaning, as, *e. g.*, where the word has been used in a different sense in a former tariff act, that intention must prevail."]

§ 84. **Meaning Differing in Different Localities.**—Where a statute applied to the United Kingdom, and the technical meaning of words differed in the different Kingdoms, the language would be taken in its popular sense (a).

§ 85. **Meaning of words at Date of Enactment.**—[The rule which requires the construction of statutes with reference to their objects and subject matters, obviously also requires] the language of a statute, as of every other writing, to be construed in the sense which it bore at the period when it was passed (b). [An act of Parliament spoke of "bread usually sold as French or fancy bread," and it was at first held by two out of three judges that this phrase was not confined to bread usually sold under that denomination at the time when the act was passed." But subsequently the contrary view of the dissenting judge was approved."<sup>96</sup>

[where it was held that the word "spirits" did not include sweet spirits of nitre. And see, as to the phrase "ad valorem," *U. S. v. Clement, Crabbe*, 499.]

<sup>96</sup> *Arthur v. Morrison*, *supra*.

<sup>97</sup> *U. S. v. Sarchet, Gilp*, 273.

<sup>98</sup> *Roosevelt v. Maxwell*, 3 Blatchf. 391. And see *Com'th v. Giltinan*, 64 Pa. St. 100, 104-5, where upon that ground "domestic distilled spirits" were held to mean spirits distilled in the state of

Pennsylvania, and not to include spirits manufactured in another state and rectified in Pennsylvania.

(a) *Saltoun v. Advocate-General*, 3 Macq. 659. [But see as to usage in different localities, post, § 362.]

(b) See *ex. gr. St. Cross v. Howard*, 6 T. R. 338; and see further inf. §§ 357 seq.

<sup>99</sup> *R. v. Wood*, L. R. 4 Q. B. 559.

<sup>100</sup> *Aerated Bread Co. v. Gregg*, L. R. 8 Q. B. 355.

Undoubtedly, all laws must be executed according to the sense and meaning they imported at the time of their passage.<sup>101</sup> Hence, where an act gave a railroad company the right to build a railway from a certain borough then bounded by a certain line, and the borough was subsequently extended beyond that line, the Court said: "We are very clear that this alteration of the borough lines did not, in the least change the rights or obligations of the railroad company. . . The amendment of one [law, *i. e.*, that fixing the borough limits] is not to be taken as a supplement to the other."<sup>102</sup> Conversely, where a turnpike charter prohibited the erection of a toll-gate within the town of T., whilst it was left undecided whether it meant the then limits, or the limits as they might be extended,<sup>103</sup> it was held clear that an amendment to such charter giving the right to extend the turnpike to a certain street within the city limits, provided no toll-gate be placed within the city limits, meant the limits as then existing.<sup>104</sup> The obligation imposed upon a canal company by its charter, as to bridging roads crossed, refers to roads in existence at the time of incorporation.<sup>105</sup> Where an act was passed to take effect on the first day of the succeeding May, which contained a reference to the Code of Practice; and, after the passage of the act, and before the day when it was to take effect, a new code was adopted, itself to go in effect on the first day of May,—it was held that the act must be construed to refer to the Code in use at the time of its passage.<sup>106</sup>

<sup>101</sup> *Com'th v. R. R. Co.*, 27 Pa. St. 339, 353. And see *Mobile v. Eslava*, 16 Pet. 234; and compare *Amer. Fur Co. v. U. S.*, 2 Id. 358.

<sup>102</sup> *Com'th v. R. R. Co.*, *ubi supra*. See to similar effect *Pont-chartrain Co. v. Lafayette*, 10 La. An. 741.

<sup>103</sup> Compare, however, *Collier v. Worth*, L. R. 1 Ex. D. 464, where the mention, in an act, of the "town of Rochdale" was held not confined to the town as it existed when the act was passed, but including streets subsequently added.

<sup>104</sup> *Detroit v. Detroit, etc., Co.*, 12 Mich. 333.

<sup>105</sup> *Morris Canal, etc., Co. v. State*, 24 N. J. L. 62.

<sup>106</sup> *Griswold v. Atl. Dock Co.*, 21 Barb. (N. Y.) 225. That, however, to some extent, a change in the circumstances of the people, with reference to which an act was passed, may affect its construction, ought probably to be conceded. Thus, where, in 1833, the provisions of the marriage laws of Pennsylvania, enacted in 1700 and 1739, came before the Supreme Court for construction, it was said that many of their provisions, "though doubtless wholesome when they were enacted," were "ill adapted to the habits and

[Upon the principle stated seems to rest the rule, that an act adopting by reference the whole or a portion of another statute, means the law as existing at the time of the adoption, and does not adopt any subsequent addition thereto or modification thereof.<sup>107</sup>]

§ 86. **Restriction of General Words to Subject Matter.**—But it is in the interpretation of general words and phrases that the principle of strictly adapting the meaning to the particular subject matter in reference to which the words are used, finds its most frequent application. However wide in the abstract, they are more or less elastic, and admit of restriction or expansion to suit the subject matter.<sup>108</sup> While expressing truly enough all that the legislature intended, they frequently express more, in their literal meaning and natural force; and it is necessary to give them the meaning which best suits the scope and object of the Statute, without extending to ground foreign to the intention. It is, therefore, a canon of interpretation that all words, if they be general and not express and precise, are to be restricted to the fitness of the matter (*a*). They are to be construed as particular if the intention be particular (*b*); that is, they must be understood as used in reference to the subject matter in the mind of the Legislature, and strictly limited to it.

§ 87. **"Persons," and other General Words.**—Thus, enactments, which related to "persons" would be variously understood, according to the circumstances under which

customs of society as it now exists," and they were accordingly held directory only: *Rodebaugh v. Sanks*, 2 Watts (Pa.) 9, 11, *per* Gibson, C. J.

<sup>107</sup> See *U. S. v. Paul*, 6 Pet. 141; *Kendall v. U. S.*, 12 Id. 524; *Shrew v. Jones*, 2 McLean, 78; *Re Freeman*, 2 Curt. 491; *Knapp v. Brooklyn*, 97 N. Y. 520; *Re Main Str.* 98 Id. 457; *Schlaudecker v. Marshall*, 73 Pa. St. 200; *Darmstaetter v. Moloney*, 45 Mich. 621; *State v. Davis*, 22 La. An. 77; *Oleson v. R. R. Co.*, 36 Wis. 383; and see further as to reference statutes, *post*, §§ 492-493.

<sup>108</sup> *Somerset v. Dighton*, 12 Mass. 382; *Whitney v. Whitney*, 14 Id. 88, 92; *Holbrook v. Holbrook*, 1 Pick. (Mass.) 248; *Maxwell v. Collins*, 8 Ind. 38.

(*a*) *Bac. Max.* 10. [See also *Brewer v. Blougher*, 14 Pet. 178; *Atkins v. Disintegrating Co.*, 18 Wall. 272.]

(*b*) *Stradling v. Morgan*, Plowd. 204. [So that, if the purpose of the act plainly be to affect only a particular class of persons, the generality of the language will not have the effect of including a single individual not belonging to that class: *U. S. v. Sanders*, 22 Wall. 492.]

they were used, as including or not including corporations (a). [In its legal significance, it is said, the word "person" is a generic term, and as such, *prima facie*, includes artificial as well as natural persons,<sup>109</sup> unless the language indicates that it is used in a more restricted sense.<sup>110</sup> Hence, under the crimes act of 1804, § 2, prescribing a penalty for the destruction of a vessel insured, the phrase "any person," was held to include corporations.<sup>111</sup> So in a statute restraining any person from doing certain acts,<sup>112</sup> as for example, the taking of usurious interest.<sup>113</sup> So, too, a corporation has been held to be a "person" within the meaning of an act making liable in damages a person inflicting injuries resulting in death;<sup>114</sup> of an act forbidding a municipality to agree, by ordinance, contract or otherwise, with any "person or persons" for the extension of gas works for supplying the corporation or its inhabitants with gas;<sup>115</sup> of the revenue laws of Kentucky;<sup>116</sup> of the Wisconsin Mill Dam act;<sup>117</sup> of an act providing that persons may be sued for a trespass in the county where it is committed;<sup>118</sup> of sec. 832 of Gantt's Ark. Dig. providing, that, if any person shall convey any real estate . . . and shall not at the time . . . have the legal estate in such lands, but shall afterwards acquire the same, the legal or equitable estate afterwards acquired shall imme-

(a) *R. v. Gardner*, Cowp. 79; *R. v. York*, 6 A. & E. 419; *R. v. Beverley Gas Co.*, Id. 645, Bac. Stat. Uses, 43, 57; *Pharmaceutical Soc. v. London Supply Assoc.*, 5 App. 857, 49 L. J. 736; *St. Leonard's v. Franklin*, 3 C. P. D. 377; *Union Steamsh. Co. v. Melbourne Harbor Trust*, L. R. 9 App. Cas. 365.

<sup>109</sup> *Douglass v. Pacific Mail, etc., Co.*, 4 Cal. 304. See to the same effect: *Cary v. Marston*, 56 Barb. (N. Y.) 27; *U. S. Tel. Co. v. West. Union Tel. Co.*, Id. 46; and see *In re Fox*, 53 N. Y. 530; *Miller v. Com'th*, 27 Gratt. (Va.) 110; *Northw. Fertil. Co. v. Hyde Park*, 3 Biss. 480; *Bish. v. Wr. L.* § 212. *Comp. Doane v. Clinton*, 2 Utah, 417. But see contra: *State v. Fertilizer Co.*, 24 Ohio St. 611, *infra*, n. 125.

<sup>110</sup> *Planter's, etc., B'k v. An-*

*draws*, 8 Port. (Ala.) 404; *Re Oregon Bulletin, etc., Co.*, 13 Bankr. Reg. 199.

<sup>111</sup> *U. S. v. Amedy*, 11 Wheat. 392; and see *Beaston v. Bank*, 12 Pet. 102.

<sup>112</sup> *People v. Utica Ins. Co.*, 15 Johns. (N. Y.) 358, 381, 382.

<sup>113</sup> *Commerc. B'k v. Nolan*, 8 Miss. 508. See also *Lumberman's B'k v. Bearce*, 41 Me. 505; *Chafin v. B'k*, 7 Heisk. (Tenn.) 459; *Stribbling v. B'k*, 5 Rand. (Va.) 132.

<sup>114</sup> *Chase v. Steamb. Co.*, 10 R. I. 79.

<sup>115</sup> *Cinc. Gas, etc., Co. v. Avondale*, 43 Ohio St. 257.

<sup>116</sup> *Louisville, etc., R. R. Co. v. Com'th*, 1 Bush. (Ky.) 250.

<sup>117</sup> *Fisher v. Horicon, etc., Co.*, 10 Wis. 351.

<sup>118</sup> *Bartee v. R. R. Co.*, 36 Tex. 648.



diately pass to the grantee;<sup>119</sup> and within the protection of the Sale of Food and Drugs Act of 1875.<sup>120</sup> Similarly, a limited partnership was held liable to the penalties imposed by statute upon "any person or corporation," for the trespass of its manager or authorized agent.<sup>121</sup>

§ 88. [On the other hand, it has been held, that, though a corporation, being a person in contemplation of law, may be included by the use, in a statute, of the term "person," yet, as, in the construction of statutes, the terms and language thereof are to be taken and understood according to their usual and ordinary signification, as generally understood among mankind, unless the context and other parts of the statute disclose a different intention; and as the term "person" is generally and popularly understood to denote a natural person, the absence of any particular indication that artificial persons are to be included in the phrase would exclude that significance in a revenue statute imposing taxation upon all personal property owned by any person whatever.<sup>122</sup> And in a later case it was said: "that the word does not usually include corporations when used in statutes or common parlance, although in its legal import it embraces them, is wise and of good authority."<sup>123</sup> But in that very case, it was held that corporations were embraced by the term "person," in the revenue act under construction, the provision that "every person, every firm and partnership, and the president, secretary, cashier or treasurer of every company or corporate body" were to deliver a statement of "all money due by solvent debtors to such person, partnership firm, company or corporate body," etc., showing a clear intention that the word should be so construed.<sup>124</sup> The

<sup>119</sup> Jones v. Green, 41 Ark. 363.

<sup>120</sup> Enniskillen Guardians v. Hilliard, 14 Ir. L. R. 214. See also Bish., Wr. Laws, § 212, citing, in addition to some of the above cases: Society, etc. v. New Haven, 8 Wheat. 464; Olcott v. Tioga R. R. Co., 20 N. Y. 210; People v. May, 27 Barb. (N. Y.) 238; Germania v. State, 7 Md. 1; Norris v. State, 25 Ohio St. 217; State v. R. R. Co., 23 Ind. 362; Memphis

v. Laski, 9 Heisk. (Tenn.) 511; Newcastle Corp'n, 12 Cl. & F. 402.

<sup>121</sup> Oak Ridge Coal Co., Lim. v. Rogers, 108 Pa. St. 147.

<sup>122</sup> School Directors v. Carlisle B'k, 8 Watts (Pa.) 289.

<sup>123</sup> Saving Fund v. Yard, 9 Pa. St. 359.

<sup>124</sup> And see Union Canal Co. v. Dauphin Co., 3 Brews. (Pa.) 124.

absence of such a requirement, together with the failure of any reference to corporations, in the first section of a later revenue act, determined the same court to hold corporations not included under the term "persons" as used in that section.<sup>126</sup> And obviously, a corporation is not a "person" within the meaning of an act permitting the formation of corporations by any number of "persons" not less than six.<sup>126</sup>

§ 89. [It is evident that the word "person" may or may not include corporations, according to the intention of the Legislature in the use of the term, and that, in ascertaining that intention, in the absence of determining features in the context, in other parts of the statute, in acts in *pari materia*, and the like, the subject matter and object of the enactment are recognized as furnishing the only guide. If any general rule can be drawn from the decisions, it would seem to be this, that, where the act imposes a duty towards, or for the protection of, the public or individuals, grants a right properly common to all, and from participation in which the limited character of corporate franchises and the absence of any natural rights in corporations do not, by any policy of the law, debar them, the term "persons" will, in general include them, whether the act be a penal or a remedial one. But in the cases of enactments having a different object in view, and especially of the class pre-eminently requiring a construction in accordance with common and popular usages of the language,<sup>127</sup> it would seem that corporations would not, in general, be included. And it would seem, further, that, wherever corporations are embraced under the term persons, the corporations intended would be, at least, primarily, only those created under the laws of the state upon

<sup>126</sup> Fox's App., 112 Pa. St. 337, 351. The decision in *State v. Fertilizer Co.*, 24 Ohio St. 611, to the effect that a corporation was not a person within the act of 15 April, 1857, to prevent nuisances, —the word persons, in its primary sense meaning natural persons only—of which it is said by Mr. Bishop (Bish., *Wr. Laws*, § 212,

note 8), that, in some of the other states it would probably be held the other way, seems to be based entirely upon the legislative sense and usage of the word person in criminal statutes in Ohio.

<sup>126</sup> *Factors', etc., Ins. Co. v. New Harbor Protection Co.* 37 La. An. 233.

<sup>127</sup> See ante, §§ 80, 83.

whose statute book the act appears,<sup>128</sup> and generally, only private, not public or municipal ones.<sup>129</sup>

§ 90. [Again, the word "persons"<sup>130</sup> may be variously understood] as meaning persons born in the Queen's allegiance, or as including also all foreigners actually within the British dominions (*a*), or (the meaning in prize and commercial law,) only persons domiciled in those dominions (*b*). In an Act which provided for the recovery of wages by "persons belonging to a ship" this expression would obviously be confined to persons employed in its service on board; while in one which related to the salvage of "persons belonging to the ship," it would as obviously include passengers as well as crew (*c*). [And the word "crew," in a statute prohibiting any master or other officer of a vessel maliciously to imprison, etc., any of the crew, was held to include, not only the common seamen, but the subordinate officers, *e. g.*, the first mate of the ship.<sup>131</sup>] The 13th Eliz. c. 5, which made void, as against creditors, all voluntary alienation of "goods," was held to apply only to such goods as were liable to be taken in execution, as the object of the Act was to prevent such property from being with-

<sup>128</sup> See *White v. Howard*, 46 N. Y. 164, 165; *U. S. v. Fox*, 94 U.S. 315.

<sup>129</sup> See *Memphis v. Laski*, 9 Heisk. (Tenn.) 511. As to the interpretation of the word "persons" so as to embrace the state or government, see post, §§ 161-168. And see *Hixon v. George*, 18 Kan. 253, that a statute making allegations of corporate existence conclusive unless denied, etc., includes municipal and quasi-municipal, as well as private, corporations.

<sup>130</sup> An act making it criminal for any person to pursue his ordinary calling on Sunday, applies to a judge holding court: *Bass v. Irvin*, 49 Ga. 436.

(*a*) *Courteen's Case*, Hob. 270, 1 Hale, P. C. 542; *Nga Hoong v. R.*, 7 Cox, 489; *Low v. Routledge*, 35 L. J. Ch. 117, 1 L. R. Ch. 42; *per Turner*, L. J.

(*b*) *Wilson v. Marryat*, 8 T.R. 31; *The Indian Chief*, 3 Rob. 12.

(*c*) *The Fusilier*, 3 Moo. N.S. 51,

34 L. J. P. M. & A. 25; see *The Cybele*, 3 P. D. 8; *U. S. v. Winn*, 3 Sumner, 209.

<sup>131</sup> *U. S. v. Winn*, *supra*. The master of a vessel, enrolled as a coasting vessel and employed on the Hudson river, was held not to be a "mariner" exempt from militia duty under the act of Congress of 1792: *Brush v. Bogardus*, 8 Johns. (N. Y.) 157. Nor was a master of a vessel held entitled to double pay for delay in payment of wages recoverable by "seamen" under 17 and 18 Vict. c. 104: *The Arina*, L. R. 12 P. D. 118. Nor was a paymaster of volunteers appointed by the President of the United States under an act of congress held exempt from civil process under the laws of Pennsylvania exempting from execution or other process "any officer, non-commissioned officer, or private of the militia" and "any person mustered into the service of the U. S.:" *Mech. Sav. B'k v. Sallade*, 1 Woodw. (Pa.) 23.

drawn from the reach of creditors; consequently, the word "goods" was held not to include choses in action, as long as these were not subject to execution (*a*). But the same word was held to include them in the reputed ownership clauses of former bankrupt and insolvent Acts (*b*); as they were deemed to fall within the specific object of the legislature, which was to protect creditors against being deceived by an apparent ownership of property. So in bankruptcy Acts, the word "creditor" is found to be limited, usually to persons who are creditors at the time of the bankruptcy and entitled to prove under it (*c*). [On the other hand, the phrase "any creditors who shall claim any debt or demand under the bankruptcy" was not restricted to such creditors only as came in and proved their debts, but embraced all creditors with subsisting claim's upon the bankrupt's estate, whether they had a security or mortgage therefor or not.<sup>132</sup> But where the intention of certain provisions was to embrace only the defalcations of public officers, administrators, and the like, it was held that the generality of the terms used in the statute, making them apparently applicable to all persons acting in a "fiduciary" capacity and to all moneys constituting a "trust fund," would nevertheless not include the case of a factor who had collected and retained the amount of a note entrusted to him by his principal for collection;<sup>133</sup> nor that of a banker.<sup>134</sup>]

(*a*) *Dundas v. Dutens*, 1 Ves. J. 196; *Rider v. Kidder*, 10 Ves. 360; *Norcutt v. Dodd*, Cr. & Ph. 100; *Sims v. Thomas*, 12 A. & E. 536.

(*b*) *Ryall v. Rowles*, 1 Ves. 367; *Exp. Baldwin*, DeG. & Jo. 230, 27 L. J. Bank. 17; "Insolvency," comp. *Re Muggridge*, Johns. 625, 29 L. J. Ch. 288; and *R. v. Saddlers' Co.*, 10 H. L. 44, 32 L. J. Q. B. 337.

(*c*) *Grace v. Bishop*, 11 Ex. 424, 25 L. J. 58; *Re Poland*, L. R., 1 Ch. 356. [See *Fowler v. Kendall*, 44 Me. 448. In the construction of an act concerning settlements, it was said, in *Guardians of Croydon v. Guardians of Reigate*, L. R. 19 Q. B. D. 385, 388, *per* Lord Esher, M. R., that "the moment of time which governs the question of settlement, is the time when the proper

persons have to make up their minds as to the removal, in other words the moment of adjudication," cit. *R. v. Guardians of Bridgnorth*, 11 Q. B. D. 314. Hence, a "wife," under such an enactment, is "not a person who has been, or will be; a wife, but who is so at that moment," and "a widow who has been a wife, but is not so at the moment of adjudication cannot be called a wife;" *per* Lord Esher, *ubi supra*.]

<sup>132</sup> *Exp. Christy*, 3 How. 292.

<sup>133</sup> *Commercial B'k v. Buckner*, 2 La. An. 1023. And see to similar effect: *Chapman v. Forsyth*, 2 How. 202; *Hayman v. Pond*, 7 Metc. (Mass.) 328; *Austill v. Crawford*, 7 Ala. 335.

<sup>134</sup> *Maxwell v. Evans*, 90 Ind. 596.

§ 91. *Inhabitant*," "*Resident*," etc.—The complex terms "*inhabitant*," ["*resident*,"] may be cited as having frequently furnished illustrations of this adaptation of the meaning to what appears to suit most exactly the object of the Act. In the abstract, the word would include every human being dwelling in the place spoken of. A right of way over a field to the parish church granted to the "*inhabitants*" of a parish would include every person in the parish (*a*). But where the object of an Act was to impose a pecuniary burden in respect of property in the locality, the expression was construed as comprising all holders of lands or houses in the locality, whether resident or not, and corporate bodies as well as individuals, but as excluding actual dwellers who had no rateable property in the place, such as servants; it being "*infinite and impossible*" to tax every inhabitant being no householder, and who could not be distrained upon for non-payment, and therefore highly improbable that the Legislature intended to tax them (*b*).

§ 92. On the other hand, where the object is to impose the performance of a personal service within the locality, the word "*inhabitant*" would probably be construed as not comprising either corporate bodies or non-resident proprietors. Thus, it was held that a person who occupied premises in one parish and carried on his business in person there, but resided in his dwelling-house in another, was not an "*inhabitant*" of the former parish so as to be bound to serve as its constable (*c*). So, an Act which authorized the imposition of a rate on all who "*inhabited or occupied*" any land or house, and the appointment of a number of "*inhabitants*" to collect the rates, was held to throw the latter duty only on actual dwellers in the locality (*d*). But here the word "*occupied*" would suggest a meaning for "*inhabitants*" distinct from "*occupiers*." [So, where a personal right is given to the inhabitants of a locality, the meaning of the word may be still more narrowed.<sup>135</sup> Thus, under an act

(*a*) *R. v. Mashiter*, 6 A. & E. 165, per Littledale, J.

(*b*) 2 Inst. 702, *R. v. North Curry*, 4 B. & C. 958, per Bayley J.

(*c*) *R. v. Adlard*, 4 B. & C. 772; and see *R. v. Nicholson*, 12

East, 330; *Williams v. Jones*, Id. 387.

(*d*) *Donne v. Martyr*, 8 B. & C. 62.

<sup>135</sup> See post, § 97.

authorizing towns and cities to subscribe for railway stock, after submission of the question to, and approval by, the "inhabitants," the latter means legal voters.<sup>136</sup> And where an act required the consent of "residents" to the bounding of a town, it was held that the phrase did not include a canal corporation whose canal extended through the town.<sup>137</sup> On the other hand, the term "householder" was deemed to include an unmarried man who kept house and employed domestic servants, within the meaning of a law calling for petition by householders for the establishment of a road.<sup>138</sup>]

§ 93. Again, another meaning would be given to the [term "inhabitant," or "resident"] where the object was to determine the settlement of a pauper, or the qualification of an elector. In those cases, a person is an inhabitant or resident of the place in which he usually sleeps (*a*). What amounts to inhabitancy in this sense, it is impossible to define. Sleeping in a place once or twice does not constitute it; and, on the other hand, such residence generally in a place, in this sense, is quite compatible with much absence from it (*b*). [Similarly, under an act fixing a limitation of two years, within which alone certain misdemeanors mentioned in the act may be prosecuted, but providing, that, where any offender "shall not have been an inhabitant of the state, or usual resident therein during the respective times for which he shall be subject and liable to prosecution," he shall be so subject within a similar period of time during which he shall be an inhabitant of, or usually a resident within, the state, one, who, after having committed an offence affected by this statute, entered the military service of the United States, served outside of the state, returning occasionally on furlough, and finally after his discharge, returned to his family and

<sup>136</sup> *Walnut v. Wade*, 103 U. S. 683.

<sup>137</sup> *People v. Shoonmaker*, 63 Barb. (N. Y.) 44.

<sup>138</sup> *Kamer v. Clatsop Co.*, 6 Oreg. 238.

(*a*) *St. Mary v. Radcliffe*, 1 Stra. 60, *per* Parker, C. J.; *R. v. Charles*, Burr. Sel. C. 706; *R. v. Stratford*, 11 East. 176; *R. v. Mildenhall*, 8 B. & A. 374; *Beal v. Ford*, 3 C.P.D. 73; *Ford v. Drew*, 5 C. P. D. 59;

*Riley v. Read*, 4 Ex. D. 100.

(*b*) *Wescomb's Case*, L.R. 4 Q.B. 110; *Taylor v. St. Mary Abbott*, L. R. 5 C. P. 309; *Bond v. St. George's*, Id. 814; and see *Whitehorne v. Thomas*, 7 M. & Gr. 1; *Ford v. Pye*, L. R. 9 C. P. 269; *Ford v. Hart*, Id. 273; *McDougal v. Paterson*, 11 C. B. 755, 2 L. M. & P. 681; *Dunston v. Paterson*, 5 C. B. N. S. 267.

residence in the state, was held not to have lost his character as "an inhabitant of the state or usual resident therein," and consequently a prosecution after his return and more than two years subsequent to the commission of the offence was barred by the statute.<sup>139</sup>] But if an Act requires residence for a certain time at least, as a qualification, it would be understood to make actual bodily presence in the place for that time indispensable; as was held in the construction of the Act which constituted the congregation of the University of Oxford, of residents; and required that those residents should have resided at least twenty weeks in a year (*a*).

§ 94. The same expression has received another meaning where the object of the Act was to preserve information as to the place where a person was to be found at times when it was most likely that he should be sought; as in the enactment which requires an attorney to indorse his "place of abode" on the summons which he issues; or a witness to a bill of sale, to add to his signature a description of his occupation and "residence." In these cases it has been held, considering the object which the Legislature had in view, that the place of business was the abode or residence intended (*b*). But in general the place of business would not be regarded as the place of abode (*c*).

Under the provisions of the County Courts Act, which gives the Superior Courts concurrent jurisdiction when the parties dwell more than twenty miles apart, the principal office of a railway company is its dwelling (*d*); but not its

<sup>139</sup> *Graham v. Com'th*, 51 Pa. St. 255.

(*a*) *R. v. Oxford* (V. C.), L. R. 7 Q. B. 471. [Ordinarily the term inhabitant, resident, imports a permanent abode, and does not apply to a mere temporary sojourning: *Ib.*; *Reeder v. Holcomb*, 105 Mass. 93; *Way v. Way*, 64 Ill. 407. And see *Fry's Election Case*, 71 Pa. St. 302, as to construction of constitutional provision requiring residence for a certain length of time in the state and election district as a prerequisite to the right of voting, to the exclusion of students at a college. See also post, § 519.]

(*b*) *Roberts v. Williams*, 2 C. M.

& R. 561; *Blackwell v. England*, 27 L. J. Q. B. 124, 8 E. & B. 541; *Attenborough v. Thompson*, 27 L. J. Ex. 23, 2 H. & N. 559; *Ablett v. Basham*, 25 L. J. Q. B. 239, 5 E. & B. 1019; *Hewer v. Cox*, 30 L. J. Q. B. 73; *Larchin v. N. W. Bank*, L. R. 10 Ex. 64, *per* Blackburn, J. See *Thorpe v. Browne*, L. R. 2 H. L. 220.

(*c*) See *R. v. Hammond*, 17 Q. B. 772; 21 L. J. Q. B. 153.

(*d*) *Adams v. Gt. Western R. Co.* 6 H. & N. 404; *Taylor v. Crowland Gas Co.*, 11 Ex. 1; *Minor v. N. W. R. Co.*, 1 C. B. N. S. 325, 26 L. J. C. P. 39.

offices or stations (a). But the manufactory or shop, where the business is substantially carried on, and not its registered office, is the dwelling, within the meaning of the same provision of a manufacturing company (b). For fiscal purposes, a corporation is regarded as residing where the governing body carries on the supreme management, though the scene of its operations and sources of profit, and even the majority of the shareholders, are out of the country, and though it has a foreign domicile and is registered abroad (c). A foreign corporation which had any establishment in this country would for the same purpose be considered as resident here, as regards the question of jurisdiction (d).

[The State, as a political body, cannot be said to reside anywhere, and therefore is not included under an act allowing deductions from the valuation of taxable property of debts due, "creditors residing within this state;" so that no deduction could be made from the valuation of an individual's real estate by reason of a mortgage upon it, given to trustees for the support of public schools.<sup>140</sup>]

§ 95. "Occupier," etc.—In the same way, the word "occupier" has received different meanings, varying with the object of the enactment. Ordinarily, the tenant of premises is the "occupier" of them, although he may be personally absent from them (e), while a servant or an officer who is in actual occupation of premises, *virtute officii*, would not be an "occupier" (f). But in the Bill of Sales Act of 1854, which provides that personal chattels shall be deemed in the possession of the grantor of a bill of sale so long as they are

(a) *Shiels v. G. N. R. Co.*, 30 L. J. Q. B. 331; *Brown v. London and N. W. R. Co.*, 4 B. & S. 326; 32 L. J. 318.

(b) *Keynsham v. Baker*, 2 H. & C. 729, 33 L. J. Ex. 41; see also *Aberystwith Pier Co. v. Cooper*, 35 L. J. Q. B. 44.

(c) *Newby v. Colt's Arms Co.*, L. R. 7 Q. B. 293; *Carron Iron Co. v. Maclaren*, 5 H. L. 459. See *Atty.-Gen. v. Alexander*, L. R. 10 Ex. 20.

(d) *Cesena Sulphur Co. v. Nicholson*, 1 Ex. D. 428. [So the place where a bank is located (§ 41, Act

Congr. 3 June, 1864) is said to be an indefinite term, to be construed with reference to the connection in which it is used, the subject matter and the object in view: *Clapp v. Burlington*, 43 Vt. 579.]

<sup>140</sup> *State v. Trenton*, 40 N. J. L. 89.

(e) *R. v. Poynder*, 1 B. & C. 178. See *Morrow v. Brady*, 12 R. J. 130.

(f) *Clarke v. Bury St. Edmunds*, 1 C. B. N. S. 23, 26 L. J. 12; *Bent v. Roberts*, 3 Ex. D. 66, 47 L. J. 112; *R. v. Spurrell*, L. R. 1 Q. B. 72, 35 L. J. 74.



on the premises "occupied" by him, actual personal occupation, and not merely tenancy is intended; and therefore the owner of chattels in rooms which he does not personally occupy is not in the apparent possession of them, within that Act (a). [So, under an act providing for taxation of residents, etc., one who has piled sawed lumber upon a wharf, to season, and pays wharfage therefore is not an occupier.<sup>141</sup> Nor under a homestead exemption act can that word apply to a public street, or alley, the fee of which is in debtor.<sup>142</sup> But, under an act giving a district court of the United States jurisdiction over offenses committed in a part of the Indian Territory "not set apart and occupied" by certain Indian tribes it was held that actual occupancy of the land by the tribes was not necessary to exclude jurisdiction, the word "occupy" being construed to mean subject to the will or control of the tribes.<sup>143</sup> Under a statute exempting from taxation property occupied by a charitable corporation, it was held that a case in which the property in question had been lately acquired by such a corporation, and the purchase had been promptly followed by diligent present preparations to build and occupy for the purposes thereof, was included.<sup>144</sup> But one who let a shed contiguous to a passage-way between it and his store, and received rent for the same, knowing it to be used for gaming, could not be punished as for "any house, building, yard, garden or other appendages thereof by him *actually occupied* for gaming."<sup>145</sup>]

(a) 17 & 18 Vict. c. 36; Robinson v. Briggs, L. R. 6 Ex. 1. As to the word "traveller," see Taylor v. Humphreys, 17 C. B. 539, 10 C. B. N. S. 429; Fisher v. Howard, 34 L. J. M. C. 42; Atkinson v. Sellers, 5 C. B. N. S. 442; Saunders v. S. E. R. Co., 5 Q. B. D. 456. "Lodger," and "occupier," Bradley v. Baylis, 8 Q. B. D. 195; Morton v. Palmer, *Id.* 7.

<sup>141</sup> Stockwell v. Brewer, 59 Me. 287. Comp. post, § 103, Dawson v. R. R. Co., 8 Ex. 8.

<sup>142</sup> Weisbrod v. Daenicke, 36 Wis. 73.

<sup>143</sup> U. S. v. Rogers, 23 Fed. Rep. 658.

<sup>144</sup> New Engl. Hospital v. Bos-

ton, 113 Mass. 518. Compare Mullen v. Erie Co., 85 Pa. St. 288, where a contrary construction was put upon a statute exempting from taxation "all churches, . . . or other *regular* places of *stated* worship," construed together with a constitutional prohibition against exemptions except as to "*actual* places of religious worship," etc. So, a provision or exception relating to vessels "engaged in navigation" of a particular kind, cannot embrace a vessel lying at a wharf, in process of construction, unfinished and hence as yet unfit for navigation: The Vermont, 6 Ben. 115.

<sup>145</sup> Com'th v. Dean, 1 Pick. (Mass.) 387.

§ 96. "Owner."—So, the word "owner" may mean occupier; as in the Towns Police Act, 1847, which requires the owners of the lands and buildings where a fire happens to pay the expense of sending fire engines to put it out (a). [Under statutes providing for compensation to the "owner" of lands taken for highways, railways, or the like, the term applies to any one having a legal interest in the same,<sup>140</sup> whether his estate be an estate in fee or less than a fee.<sup>141</sup> A tenant is an "owner or party interested" within such an act.<sup>142</sup> A trustee under a deed of trust is an "owner," so as to be a necessary party to a suit for the enforcement of a lien for taxes.<sup>143</sup> But a tenant for life of property fronting on a street has been held not to be an owner within a statute authorizing the paving, etc., of a street when a majority of the "owners" of property on the same shall apply for it.<sup>144</sup> A qualified interest in real estate coupled with possession has been held to make a man the owner of real estate within the statutory requirement making ownership of real estate a qualification for service as a juror;<sup>145</sup> and as used in the Minnesota homestead law, the term includes equitable as well as legal ownership.<sup>146</sup> So, the pledgee of stock, transferred to him as collateral and standing in his name, is affected with personal liability in respect of the same as the owner of it within the meaning of a statute making stockholders personally liable to the creditors of the corporation in an amount equal to the stock owned by them.<sup>147</sup> Again, a

(a) 10 & 11 Vict. c. 89; *Lewis v. Arnold*, L. R. 10 Q. B. 245. See *Exp. Saffron Hill*, 24 L. J. M. C. 56; *School Board v. Islington*, 1 Q. B. D. 65; *Anketill v. Baylis*, 52 L. J. Q. B. 104.

<sup>140</sup> *State v. R. R. Co.*, 36 N. J. L. 181; and see *Smith v. Ferris*, 13 N. Y. Supr. Ct. 553.

<sup>141</sup> *Schoff v. Improvement Co.*, 57 N. H. 110.

<sup>142</sup> *Pa. R. R. Co. v. Eby*, 107 Pa. St. 166; *North Pa. R. R. Co. v. Davis*, 26 Id. 238. See, however, *State v. R. R. Co.*, supra, as to the meaning of the phrase "persons interested," including not only persons having an actual legal estate, but also those having some independent right not amounting to such an estate, as, *e. g.*, a right

of way, inchoate right of dower or curtesy, or charges or liens on the legal estate, by judgment or mortgage. See post, § 108; *New York v. Lord*, 17 Wend. (N. Y.) 285.

<sup>143</sup> *Gitchell v. Kreidler*, 84 Mo. 472; though the omission to join him will not render the tax sale wholly void, but merely leave his interest unaffected: *Id.*

<sup>144</sup> *Baltimore v. Boyd*, 64 Md. 10.

<sup>145</sup> *Territory v. Young*, 2 New Mex. 93.

<sup>146</sup> *Wilder v. Haughey*, 21 Minn. 101; *Hartman v. Munch*, *Id.* 107.

<sup>147</sup> *Aultman's App.*, 98 Pa. St. 505; the term "subscribed," used in the statute, being construed "owned," in conformity with a constitutional provision in *pari materia*: see post, § 181.

statute imposing upon the "owners" of factories the duty of erecting fire-escapes, it is held that by the term "owner" is to be understood he who is in the actual possession and occupancy of the premises, who places the operatives in a position of danger and enjoys the benefit of their services; and if a tenant is in such possession under a lease from the owner of the building, the tenant and not the landlord, is liable under the act,<sup>154</sup> even though the latter occupies another portion of the building.<sup>155</sup> So, the same term, in a statute making the owner of a vehicle driven against another, through failure to turn to the right, liable in treble damages, means the person in mediate or immediate control of the vehicle, though he be not the actual owner;<sup>156</sup> and in an act giving a right of action against the owner of any locomotive or car for an injury sustained by reason of a defect in the same, the word "owner" is not confined to the person who has the absolute right of property, but means the person who is the owner at the time of the injury and for the purpose of operating the railroad on which they are used, thus making a railroad company hiring cars from a builder and running them on its road, liable to such action.<sup>157</sup> But a tax upon all property "owned" by a railway company would not include Pullman cars leased to it.<sup>158</sup> And in the abandoned and captured property act of Congress giving the "owner" of property sold by the government the right to recover the proceeds of the sale, that term obviously cannot include a factor, who, being entrusted with the property for the purpose of selling it, had made advances upon it, which would give him a lien upon it, with the right of possession,—a special property,—but could not make him the owner within the purposes of the act.<sup>159</sup> Nor is a husband, occupying the statutory separate property of the wife as a homestead, its owner within the meaning of the Ohio statute exempting property from execution.<sup>160</sup>

<sup>154</sup> *Schott v. Harvey*, 105 Pa. St. 222 (cit. *Lee v. Kirby*, 10 Col. & Cinc. W. Law Bull. 449); *Keely v. O'Connor*, 106 Pa. St. 321.

<sup>155</sup> *Keely v. O'Connor*, supra.

<sup>156</sup> *Camp v. Rogers*, 44 Conn. 291.

<sup>157</sup> *Proctor v. R. R. Co.*, 64 Mo. 112. See also, post, § 103, *Doggett*

*v. Cattarns*, 34 L. J. C. P. 46.

<sup>158</sup> *State v. St. Louis Co. Ct.*, 18 Mo. App. 53.

<sup>159</sup> *U. S. v. Villalonga*, 23 Wall. 35, 42. See infra, note 304, *Stone v. New York*, 25 Wend. (N. Y.) 177.

<sup>160</sup> *Davis v. Dodds*, 20 Ohio St. 473.

§ 97. **Additional Illustrations.**—This restriction of meaning may be carried still further to promote the real intention, and not exceed the object and scope of the enactment. Thus, an Act, which, reciting the inconveniences arising from churchwardens and overseers making clandestine rates, enacted that those officers should permit “every inhabitant” of the parish to inspect the rates, under a penalty for refusal, was held not to apply to a refusal to one of the churchwardens, who was also an inhabitant. As the object of the Act was limited to the protection of those inhabitants only who had previously no access to the rates (which the churchwardens had), the meaning of the term “inhabitants” was limited to them (*a*).

In another case, the majority of the Judges of the Queen’s Bench went further than the Chief Justice thought legitimate, in giving an unusual and even artificial meaning to a word, for the purpose of keeping within the apparent scope of the Act. The treaty between Great Britain and the United States of 1842 and the 6 & 7 Vict. c. 76, passed to give the Executive the necessary powers for carrying its provisions into effect, having provided that each State should, on the requisition of the other, deliver up to justice all persons, who, being charged with murder, “piracy,” or other crimes therein mentioned, committed within the jurisdiction of either State, should seek an asylum or be found within the territories of the other; it was held that the word “piracy” was confined to those acts which are declared piracy by the municipal law of either country, such as slave-trading, and did not include those which are piracy in the ordinary and primary sense of the word, that is, *jure gentium*: for as the latter offence was within the jurisdiction of all States, and was triable by all, and the offenders could not, consequently, be said to seek an asylum in any State, since none could be a place of safety for them, that species of the crime was not within the mischief intended to be remedied by the treaty or the Act. (*b*).

(*a*) *Wethered v. Calcutt*, 5 Scott N. R. 409; see also *R. v. Master-ton*, 6 A. & E. 153. [See also, ante, § 92; *Walnut v. Wade*, 108 U. S. 683.]

(*b*) *Re Ternan, or Tivnan*, 33 L. J. M. C. 201, 5 B. & S. 645. See also *Kwok Ah Sing v. Atty.-Genl.* 5 P. C. 179.

[Again, under an act forbidding the selling of wine, etc., without a license, except by a wine grower selling "on his own premises," it was held that the latter must be the place of production or manufacture.<sup>161</sup>

§ 98. [As further illustrations of construction conforming with the rule in question, the following instances are worthy of notice. A statutory exemption of ship-owners from liability for loss by fire, but excluding from the benefit of the act the owners of vessels engaged in inland navigation, was held, nevertheless, to extend to vessels navigating the great lakes, such navigation not being inland within the meaning of the exception.<sup>162</sup> An act authorizing the issuing of bonds by a county in aid of the building of a railroad and other works of internal improvement, was held not to authorize the issuing of bonds for the building of a courthouse, it appearing, from the fact that another statute had authorized the borrowing of money for county buildings, that this particular object could not be within the intention of the general language of the later act.<sup>163</sup> A statute requiring certain contracts to be in writing, and the consideration to be expressed therein, applied to executory contracts only, and not to instruments which, of themselves, by words of grant, assignment, surrender or declaration of trust, are effectual to pass the estate, title or interest.<sup>164</sup> An act allowing the issuing of warrants of attachment in any action arising on contract, for the recovery of money only, was, by reference to other provisions upon that head, showing that its subject matter was only claims of liquidated and ascertainable amounts, held inapplicable to suits upon breach of promise of marriage.<sup>165</sup> In an act, whose manifest object was to prohibit sheriffs and their deputies, in their official capacity, from becoming purchasers at their own sales and being induced to act corruptly in relation to them by their interests as purchasers, the generality of the language forbidding any sheriff or any deputy sheriff to purchase any

<sup>161</sup> State v. Wyl, 55 Mo. 67.

<sup>162</sup> Moore v. Transp. Co., 24  
How. 1.

<sup>163</sup> Lewis v. Sherman Co. Com-  
m'rs, 1 McCrary 377.

<sup>164</sup> Cruger v. Cruger, 5 Barb. (N.  
Y.) 225.

<sup>165</sup> Barnes v. Buck, 1 Lans. (N.  
Y.) 268.

property at any execution sale, and declaring all purchases so made void, was so restricted as not to interfere with the right of a sheriff or deputy to bid upon and purchase property sold by another on an execution issued upon a judgment held by the former, *i. e.*, with the collection of his own demands.<sup>166</sup> Where a municipal ordinance forbade the sale of fresh meat, within certain limits, except by licensed persons, but contained a proviso in favor of farmers permitting them to sell meats, the produce of their farms, it was held that one whose business was that of a butcher was not within the proviso although the meat sold by him came from his farm, if the latter was only an appendage to his business as a butcher.<sup>167</sup> Conversely, one employed to buy a piece of real estate, that not being his regular business, does not thereby become a real-estate broker, within the meaning of a statute requiring such to be licensed.<sup>168</sup>

§ 99. [In the numerous statutes which give laborers certain preferences over other creditors, liens or immunities, the word "laborers" has been variously construed. Under statutes giving preferences to laborers for their wages out of the proceeds of execution against, and sale of, the property of their employer, it has been held that as laborers should be regarded only those, who, with their own hands, perform the contract they make with the employer, and that one who performs a contract to deliver lumber, by hiring teams and drivers, is not a laborer within the meaning of the act.<sup>169</sup> Moreover, as the object of these acts is to secure to the *manual* laborer the fruit of his own toil, for the subsistence of himself and his family, the term "laborer" was held not to embrace a civil engineer;<sup>170</sup> the members of an engineer corps or an assistant general manager;<sup>171</sup> the

<sup>166</sup> Jackson v. Collins, 3 Cow. (N. Y.) 85. Comp. post, § 270.

<sup>167</sup> Rochester v. Pettinger, 17 Wend. (N. Y.) 265.

<sup>168</sup> Chadwick v. Collins, 26 Pa. St. 138. So, "The word 'dealer' alone, in a variety of statutes, including criminal ones, is held not to be satisfied by a single instance of traffic." Bisn., Wr. L., § 210, cit.: Carter v. State, 44 Ala. 29;

Overall v. Bezeau, 37 Mich. 506; Barton v. Morris, 10 Phila. (Pa.) 360; State v. Yearby, 82 N.C. 561. See also Eastman v. Chicago, 97 Ill. 178. But Comp. State v. Pad-dock, 24 Vt. 312.

<sup>169</sup> Wentworth's App., 82 Pa. St. 469.

<sup>170</sup> Pa., etc., R.R. Co. v. Leuffer, 84 Pa. St. 168.

<sup>171</sup> State v. Rusk, 55 Wis. 465.

president of an insolvent manufacturing corporation, in respect of his salary;<sup>172</sup> or an overseer.<sup>173</sup> So, under an act forbidding preferences in assignments for the benefit of creditors, except in favor of laborers, servants and employees, a manufacturer, who, under the contract with the assignor, sawed at his own establishment, by his machinery and hands, a certain quantity of lumber furnished by the assignor, was held not entitled to any preference made in his favor in the assignment.<sup>174</sup> Similarly, under statutes prohibiting the attachment of laborer's wages, the pay of a boss of a department, at a certain rate per month, he employing and discharging the hands, was held not protected;<sup>175</sup> nor the money due under a contract to one who had contracted to excavate and grade a street at a certain rate per cubic yard, and used two carts and several horses in the prosecution of the work, with a number of men sufficient, with himself, to keep the carts and horses employed.<sup>176</sup> But it is otherwise as to the money earned by, *e. g.*, a miner, by his own labor, who employs a common laborer to assist him at so much per day;<sup>177</sup> for a man who earns his livelihood by his own personal manual labor is a laborer, although his superior skill and care may entitle him to a greater compensation than the common laborer,<sup>178</sup> and it is immaterial whether the wages agreed to be paid are measured by time, by the ton, or piece, or any other standard:<sup>179</sup> and the helpers or assistants of the chief workman, where the nature of the work requires

<sup>172</sup> *England v. Organ, etc., Co.*, 41 N. J. Eq. 470.

<sup>173</sup> *Whitaker v. Smith*, 81 N. C. 340. But see *Cullins v. Mining Co.*, 2 Utah, 219, to the effect that it includes a superintendent or foreman of a mine; and *Stryker v. Cassidy*, 76 N. Y. 50, that the word "labor" in the mechanics' lien law of 1862, includes skilled labor, *e. g.*, of an architect, irrespectively of the grade of employment. Compare with this Pa., etc., *R. R. Co. v. Leuffer*, 84 Pa. St. 168, per Sharswood, J.: "It is true, in one sense the engineer is a laborer; but so is the lawyer and doctor, the banker and corporation officer, yet no statistician has ever been known to in-

clude these among the laboring classes." (p. 172.)

<sup>174</sup> *Campfield v. Lang*, 25 Fed. Rep. 128.

<sup>175</sup> *Kyle v. Montgomery*, 73 Ga. 337.

<sup>176</sup> *Heebner v. Chave*, 5 Pa. St. 115. But that a teamster is a laborer, see *Mann v. Burt*, 35 Kan. 10.

<sup>177</sup> *Pa. Coal Co. v. Costello*, 33 Pa. St. 241.

<sup>178</sup> *Ibid.* (The decision in *Heebner v. Chave*, *supra*, is doubted in this case; but it is approvingly quoted in Pa., etc., *R. R. Co. v. Leuffer*, *supra*.) Comp. *Stryker v. Cassidy*, *supra*.

<sup>179</sup> *Seiders's App.*, 46 Pa. St. 57.

such, are as much within the protection of these statutes as are those of the principal workman, though the former be employed by the latter as the agents of the proprietor.<sup>180</sup> A "consulting engineer" was held not to be a "laborer" or "operative" within the meaning of an act charging stockholders for the services of such rendered to the corporation.<sup>181</sup>

§ 100. [An act prohibiting wagers or bets upon the result of elections was, with reference to its object, construed to refer only to elections to public offices, not to primary, or corporate elections.<sup>182</sup> An act relative to costs in partition proceedings provided "that the costs in all cases of partition . . . with a reasonable allowance to the plaintiffs or petitioners for counsel fees, to be taxed by the court or under its direction, shall be paid by all the parties in proportion to their several interests." It was held that the object of this provision was to equalize the burden of making partition; that, therefore, it authorized the court to fix a reasonable allowance for plaintiff's counsel fee, graduated according to the nature and extent of the services necessarily rendered for the common benefit of all; but not for services in an adversary proceeding, resulting from a defense to plaintiff's demand for a partition, or from any other cause.<sup>183</sup> An act provided that "the widow or the children of any decedent . . . may retain property to the value of

<sup>180</sup> Ibid.

<sup>181</sup> *Ericsson v. Brown*, 38 Barb. (N. Y.) 390.

<sup>182</sup> *Com'th v. Wells*, 17 W. N. C. (Pa.) 164; whilst, from the same consideration, a constitutional provision disqualifying from holding any office of trust or profit, and depriving, for the period of four years, of the right of suffrage, any person who shall, while a candidate for office, willfully violate any election law, was held to extend to laws regulating primary, or delegate elections: *Leonard v. Com'th*, 112 Pa. St. 607. Post, § 508. In *Com'th v. Howe*, 144 Mass. 144, an act punishing "whoever . . . at any national, state, or municipal election . . .

knowingly gives more than one ballot at one time," etc., was held inapplicable to a municipal election upon a question of granting license for the sale of liquors. The decision is based upon the "obvious purpose" of the original enactment and subsequent re-enactment of the statute, and upon a reference to the acts concerning elections in force at the time of the enactment of the statute, there being none for such elections (See ante, § 85), and to other acts in pari materia showing that the word "ballot" was not used concerning such elections.

<sup>183</sup> *Fidelity, etc., Co's. App.*, 108 Pa. St. 339.



\$300 . . for the use of the widow and family.” The object of the act being ascertained to be merely a temporary provision for the widow and those immediately dependent upon the deceased, it followed that the allowance could not be claimed by a widow who had deserted her husband; who was living in a foreign country, separated from and her husband and never part of his family in the state; who had married again; nor by children who were adults, not members of the decedent’s immediate family, but who had left his home to provide for themselves;<sup>184</sup> nor by a widow who had been divorced from the decedent, *a mensa et thoro*.<sup>185</sup> And the main purpose being to provide for the widow, the act was held not to apply to the property of a wife and mother, in favor of her children, as against her husband,<sup>186</sup> whilst it did apply to the property of a widow, in favor of her children, as against her creditors.<sup>187</sup> Again, the charter of a railway company gave it all the rights and privileges for the settling and obtaining the right of way, then enjoyed by certain other railway companies also incorporated by special acts. The latter referred to and designated the manner in which those corporations might acquire the right of way over private property. This, therefore, being the object and subject-matter of the provision, the generality of its language was restricted thereto, and not permitted to include or extend to the mode of settling differences between township authorities and the railroad company when the latter had taken possession of a public road.<sup>188</sup> A posthumous child of a brother of an intestate would not be a “posthumous relation” within the meaning of an intestate act unless born after the death of the intestate; for the reference is to him.<sup>189</sup>

§ 101. [Where an act provided for the improvement of a road from the village of H. to that of M., a construction of its language with reference to the subject matter demonstrated that the phrase “from” the village of H. was intended to in-

<sup>184</sup> Nevin’s App., 47 Pa. St. 230.

<sup>185</sup> Hettrick v. Hettrick, 55 Pa. St. 290.

<sup>186</sup> King’s App., 84 Pa. St. 345; Wanger’s App., 105 Id. 346.

<sup>187</sup> Hine’s App., 94 Pa. St. 381.

<sup>188</sup> Danville, etc., R. R. Co. v. Com’th, 73 Pa. St. 29, 36.

<sup>189</sup> Shriver v. State, 65 Md. 278.

clude a part of the same.<sup>190</sup> A statute whose main object was taxation, authorized the treasurer to collect sums to be paid by curators of vacant successions. It was held to be restricted to sums that should go into the treasury as a revenue, and not to include those which should be deposited there for absent heirs and which constituted no part of the revenue.<sup>191</sup> The object of the New Hampshire statute permitting an allowance to be made by the probate judge to a widow, out of her deceased husband's estate, for her "present support" being that of a provision for her immediately after her husband's death, there was held to be no authority for making her the allowance after the lapse of several years, upon settlement of the estate.<sup>192</sup> Where the charter of a cemetery company provided that a certain number of acres of land should be forever appropriated and set apart as a cemetery, which, so long as used as such, should not be liable to any tax or public imposition whatever, it was held, that, as the object was to exempt the property from all taxes and charges imposed for the purpose of revenue, but not to relieve it from impositions inseparably incident to the location in regard to other property, a paving tax, for paving the street in front of the property in question was not embraced in the exemption, notwithstanding the general and sweeping language in which it was declared.<sup>193</sup>

[On the general principle under discussion would seem also to rest the rule that an act adopting another by reference does not adopt it beyond the purposes of the new act.<sup>194</sup>

<sup>190</sup> *Smith v. Helmer*, 7 Barb. (N. Y.) 416.

<sup>191</sup> *Succession of D'Aquin*, 9 La. An. 400; *Leake v. Linton*, 6 Id. 262.

<sup>192</sup> *Hubbard v. Wood*, 15 N. H. 74. Four years had elapsed

<sup>193</sup> *Baltimore v. Greenmount Cem'y*, 7 Md. 517. And see, to similar effect: *Re Mayor, etc.*, of New York, 11 Johns. (N. Y.) 81; *Bleecker v. Ballou*, 8 Wend. (N. Y.) 263; *People v. Brooklyn*, 4 N. Y. (4 Comst.) 429. But, where the charter of a cemetery company provided that the lands thereof should be "exempt from taxation,

except for state purposes," and the city within whose boundaries they lay, and which had constructed a sewer on a street along the line of which part of the company's burying lots lay, and had levied an assessment upon them to defray part of the cost of such improvement, it was held that the assessment was a species of local taxation and within the exemption clause of the charter: *Olive Cem'y Co. v. Philadelphia*, 93 Pa. St. 129.

<sup>194</sup> *Com'th v. Betts*, 76 Pa. St. 465, 471; *Graver v. Febr*, 89 Id. 460, 464. In *Jones v. Dexter*, 8 Fla. 276, it is said that a reference

§ 102. **Object may Supply Unexpressed Condition.**—[A consideration of the object and subject matter of an act may also circumscribe the broad meaning of words by supplying that in the language of the statute which must have been the intention of the same but is not expressly stated. Thus, where a statute required insurance companies, before commencing business, to have a certain amount secured by mortgage "on unencumbered real estate," it was held that the land must be within the state.<sup>196</sup> So, under an act which entitled a defendant against whom judgment had been recovered to a stay of execution, if he "in the opinion of the court is possessed of a freehold, worth the amount of such judgment clear of all incumbrances," it was held that the freehold must be within the county where the judgment was entered.<sup>197</sup> The object, in each instance, was to create or furnish a security. In order to be effectual, the security, in the first case, must be within the state's jurisdiction, in the latter, within the reach of the judgment creditor and the efficacy of the judgment as a lien.<sup>197</sup>]

§ 103. **Beneficial Construction.**—It is said to be the duty of the judge to make such construction of a statute as shall suppress the mischief and advance the remedy (a); and the widest operation is therefore to be given to the enactment, so long as it does not go beyond its real object and scope. When, for instance, the language, in its usual meaning, falls short of the whole object of the legislature, a more extended meaning may be attributed to it, if fairly susceptible of it. The scope of the Act being ascertained, the words are to be construed as including every case clearly within that object, if they can do so by any reasonable con-

in one act to another incorporates in the former only the general powers and provisions of the latter, not the special ones; such only as will stand with reason and right; and that the incorporated provisions will be more liberally construed in the incorporating, than in the incorporated statute. See *Quinn v. Fid. Ben. Ass'n*, post, § 108.

<sup>196</sup> *State v. King*, 44 Mo. 283.

<sup>197</sup> *Com'th v. Meredith*, 2 Binn.

(Pa.) 432.

<sup>197</sup> No distinction has been made in the application of the rule discussed in this chapter, as between penal and other statutes. A glance at the decisions cited will show that the rule, thus far, applies to both classes.

(a) *Heydon's Case*, 3 Rep. 7b. *Per* Lord Kenyon in *Turtle v. Hartwell*, 6 T. R. 429; *per* Cockburn, C. J., in *Twycross v. Grant*, 2 C. P. D. 530.

struction, although they point primarily to another or a more limited class of cases (a). Thus, Acts which gave a "single woman" who had a bastard child the right to sue the putative father for its maintenance have been held to include in that expression, not only a widow (b), but a married woman living apart from her husband (c); for, the general object of the Act being to compel men to contribute to the support of their illegitimate offspring, even a married woman living under circumstances incompatible with marital access, though not in popular language a single woman, is nevertheless, for the purposes of the Act, and therefore in the contemplation of the legislature, as "single" as a woman who has no husband. [So, where the object and context of a statute require it, the phrase "single man" may be taken in a generic sense, as including an unmarried woman.<sup>198</sup> And under a statute punishing any person, who, in the night, should willfully disturb any "neighborhood or family," an indictment lies for disturbing a woman occupying a dwelling-house alone.<sup>199</sup> So, a surety was held included in the phrase "co-partners, or joint or several obligors, or promissors, or contractors," the death of one of whom was not to discharge his estate.<sup>200</sup> And an act giving to a married woman the power to convey, with the assent of her husband, any real or personal property which might come to her by "gift of any person except her husband," was held to confer the right to alienate land conveyed to her by a third person for a pecuniary consideration.<sup>201</sup> The word "grain," in a penal statute, was held to include millet, or sugar cane seed,<sup>202</sup> and the phrase "inhabited dwelling house," in a statute against arson, to embrace a

(a) *Per* Cleasby. B., in *Scott v. Legg*, 2 Ex. D. 42.

(b) *Antony v. Cardenham*, 2 Bott, 194; *R. v. Wymondham*, 2 Q. B. 541.

(c) *R. v. Pilkington*, 2 E. & B. 546, S. C. nom. *Exp. Grimes*, 22 L. J. M. C. 153; *R. v. Collingwood*, 12 Q. B. 681; *R. v. Luffe*, 8 East, 193. *Comp. Stacey v. Lintell*, 4 Q. B. D. 291.

<sup>198</sup> *Silver v. Ladd*, 7 Wall. 217. Where a part of an entire tract of land upon which plaintiff's mill was built, including the pond or

water basin which was a necessary adjunct or appurtenance to the mill, was in a certain county, the remainder being in another, it was held that this was a "single tenement" within the meaning of the statute giving jurisdiction to the court of either county: *Finney v. Somerville*, 80 Pa. St. 59.

<sup>199</sup> *Noe v. People*, 39 Ill. 96.

<sup>200</sup> *Bowman v. Kistler*, 33 Pa. St. 106.

<sup>201</sup> *Chapman v. Miller*, 128 Mass. 269.

<sup>202</sup> *Holland v. State*, 34 Ga. 456.

jail.<sup>203</sup>] The authority given by the Municipal Corporations Act to expend the local funds upon "corporate buildings" was construed as extending to the cost of lining the corporation pew in the church (*a*). [So, under a statute authorizing the destruction of a building, by order of the mayor of a city, to prevent the spreading of a conflagration, and a recovery against the municipality in favor of the owner and all persons having any estate or interest therein, it was held that injury to personal property in the building could be recovered by the tenant occupying the same, in addition to the recovery by the owner of the building itself for the damage done to it.<sup>204</sup>] An Act which required a railway company to make, for the accommodation of the owners and occupiers of the adjacent lands, sufficient fences for protecting the lands from trespass, and the cattle of the owners and occupiers from straying thereout, was held to include in the term "occupier" a person who merely had put his cattle on land with the license of the occupier (*a*). And the same word, even when coupled with "owner," has been construed, with the view of promoting the object of the enactment and reaching the mischief aimed at, as including a person standing on a spot in a park or place, where he had no more right to stand than any other person (*b*). So, it was held that a fishing-boat of ten tons provided with masts, which unshipped, and sails used for going to sea, but which was propelled by four oars in harbor and shallow water,

<sup>203</sup> *People v. Cotteral*, 18 Johns. (N. Y.) 115; *Com'th v. Posey*, 4 Call (Va.) 109.

(*a*) 5 & 6 W. 4, c. 76; *R. v. Warwick*, 8 Q. B. 926.

<sup>204</sup> *New York v. Lord*, 17 Wend. (N. Y.) 285; 18 Id. 126. But this doctrine was not extended so as to permit the lessee to recover the value of merchandize destroyed which did not belong to him, but was the property of others, in his possession as factor, or merely on storage: *Stone v. New York*, 25 Wend. (N. Y.) 177. See ante, § 96, *U. S. v. Villalonga*, 23 Wall. 35. The authority conferred upon the mayor to order the destruction of a building in such cases was held

not to be the grant of a right of eminent domain, and therefore not within the constitutional provision requiring compensation for the taking of private property; but the provision of the statute was only the regulation of a right which even individuals possess, in cases of inevitable necessity, of destroying property to prevent an impending calamity. See *Klopp v. Live Stock Ins. Co.*, 1 Woodw. (Pa.) 445.

(*a*) *Dawson v. Midland R. Co.*, 8 Ex. 8; and see *Kittow v. Liskeard*, L. R. 10 Q. B. 7. [See ante, § 95.]

(*b*) See *Doggett v. Cattarns*, 34 L. J. C. P. 46; *Bows v. Fenwick*, L. R. 9 C. P. 339. [See ante, § 96.]

was "a ship" within the Merchant Shipping Act of 1862, which provides that when a collision between two "ships" takes place, the master of each ship is bound to render assistance to the other, on pain of the cancellation or suspension of his certificate. Though the Merchant Shipping Act, 1854, s. 2, enacted that the term "ship" should "have the meaning" thereby "assigned" to it, viz., that it should "include every description of vessel used in navigation not propelled by oars," this was considered not to be a definition, and as not excluding vessels which it did not include (*a*). [Similarly, the term "vessel" has been applied to a floating elevator, unlicensed, unenrolled, with no motive power or capacity for other cargo than the elevator;<sup>205</sup> and under a statute giving a lien to the builder of a vessel, it was held to include a canal boat.<sup>206</sup> In a statute allowing recovery of damages for injuries to a man's team, cattle or horses driven in droves along the highway, are held included;<sup>207</sup> and a "yoke" of oxen, in an exemption statute, is not necessarily confined to cattle broke to work, if they are intended by their owner for use as work cattle and are old enough to be so used.<sup>208</sup> Under a similar statute, a "buggy" is a "wagon."<sup>209</sup>]

§ 104. "Done" including "Omitted."—The statutes which require notice of action for anything "done" under them are construed as including an omission of an act which ought to be done as well as the commission of a wrongful one (*b*).

§ 105. *Qui facit per Alium*, etc.—A statute which requires

(*a*) *In re* Fergusson, L. R. 6 Q. B. 280. Comp. The Mac, 7 P. D. 38. See 36 & 37 Vict. c. 85, s. 16. [A statute of Georgia, of 1842, gave a lien to those furnishing logs to steam saw mills. The act of 1857 repealed this act as to all saw-mills upon the several mouths of the Altamaha, and declared that the "mouths of the Altamaha" should include all mills within 10 miles of Darien, in a straight line. It was held that a mill, not strictly on one of said mouths, but within 10 miles of D. by a straight line, was within the terms of the act of 1857:

Townsend Sav. B'k v. Epping, 3 Woods. 390.]

<sup>205</sup> The Hezekiah, 8 Ben. 556.

<sup>206</sup> King v. Greenway, 71 N. Y. 413.

<sup>207</sup> Elliott v. Lisbon, 57 N. H. 27.

<sup>208</sup> Mallery v. Berry, 16 Kan. 294.

<sup>209</sup> Allen v. Coates, 29 Minn. 46; and so is a hearse: Spikes v. Burgess, 65 Wis. 428.

(*b*) Wilson v. Halifax, L. R. 3 Ex. 114; Poulsum v. Thirst, L. R. 2 C. P. 449; see also Davis v. Curling, 8 Q. B. 286; Newton v. Ellis, 5 E. & B. 115.

something to be done by a person would be complied with, in general, if the thing were done by another for him and by his authority; for it would be presumed that there was no intention to prevent the application of the general principle of law that *qui facit per alium facit per se*; unless there was something either in the language or in the object of the statute which showed that a personal act was intended. On this ground, an Act of Parliament which requires that notice of appeal shall be given by churchwardens is complied with if given by their attorney (a); [and a statutory requirement of an oath to be administered "by the court or judge" is satisfied by an oath administered by the clerk of the court, in open court, under the direction of the court, and tested by the clerk.<sup>210</sup>] So, the Dramatic Copyright Act, 3 & 4 Will. 4, c. 15, which requires the written consent of the author of a drama to its representation, would be sufficiently complied with if the consent were given by the author's agent (b). When an Irish Statute, after giving to tenants for lives, or for more than fourteen years, the right of felling any trees which they had planted, required that "the tenant so planting" them should file an affidavit within twelve months, in a form given by the Act, which purported throughout to be made by the tenant personally, the House of Lords construed the Act as satisfied by the affidavit of the tenant's agent. A stricter construction, it was said,

(a) *R. v. Middlesex*, 1 L. M. & P. 621; *R. v. Carew*, 20 L. J. M. C. 44n.; *R. v. Kent*, 8 Q. B. 315. See other instances in *Walsh v. Southworth*, 20 L. J. M. C. 165, 2 L. M. & P. 91; *R. v. Huntingdonshire*, 1 L. M. & P. 78; *Charles v. Blackwell*, 1 C. P. D. 548; *Re Lancaster*, 3 Ch. D. 498; *Nicholson v. Hood*, 9 M. & W. 365; *Brooker v. Wood*, 5 B. & Ad. 1052; *Jory v. Orchard*, 2 B. & P. 39; *Philps v. Winchcomb*, 3 Bulstr. 77. Comp. *Hider v. Donell*, 1 Taunt. 383. [See ante, § 74, *Ruthbun v. Acker*, 18 Barb. (N. Y.) 393, that a requirement of notice to a person, in a statute, *prima facie* means personal notice to him.]

<sup>210</sup> *Oaks v. Rogers*, 48 Cal. 197. Somewhat analogous to the prin-

ciple here discussed is that involved in the decision in *Borlin v. Highberger*, 104 Pa. St. 143, that an act authorizing the recorder of deeds to certify the recognizances of the sheriff, taken by him, to the prothonotary, in order to create a lien on the lands of the sureties, etc., was complied with by a transmission of a certified copy of such recognizance. See ante § 19. But under an act requiring an affidavit of loss to be served on a railway company in order to render it liable for stock killed on its track, service of the original affidavit is essential, and that of a copy thereof insufficient: *Cole v. R. R. Co.*, 38 Iowa 311.

(b) *Morton v. Copeland*, 16 C. B. 517, 24 L. J. 169.

would have rendered the Act inapplicable to most of the cases which it had in view (*a*). [So, under various statutes requiring, in certain actions, that the defendant, within a specified time, should file an affidavit of defense, and authorizing the entry of judgment for plaintiff in default thereof, it has been held, that, in order to prevent frequent failures of justice, an affidavit of defense may, in cases of disability or absence of defendant, be made by another person, conusant of the facts, and acting for the defendant, and always by a party in interest though not of record.<sup>211</sup>]

The principle is well illustrated by two decisions under the 6 & 7 Vict. c. 18, which required that the person who objected to a voter should sign a notice of his objection, and deliver it to the postmaster. This was held to require personal signature, but not personal delivery or receipt. It was material that the person objected to should be able to ascertain that he really was objected to by the objector, which he could not so easily do if a signature by an agent was admitted; just as, to guard against personation, the signature of a voting paper under the former Municipal Corporations Act must be personal and not by agent (*b*). But there was no valid reason for supposing that the legislature did not intend to give effect to the rule *qui facit per alium facit per se*, in the case of the mere delivery (*c*). The knowledge of the servant may be constructively that of the master within the meaning of an Act, even when making the master penally responsible (*d*). An Act (18 & 19 Vict. c. 121) which authorizes justices to summon a person by whose act a nuisance arises, or, if that person cannot be ascertained the occupier of the premises in which it exists, was held to authorize the summoning of the occupier, if the person who

(*a*) *Mountcashel v. O'Neil*, 5 H. L. 937.

<sup>211</sup> See *Sleeper v. Dougherty*, 2 Whart. (Pa.) 177; *West v. Simmons*, Id. 261; *Hunter v. Reilly*, 36 Pa. St. 509; *Frailey v. Steinmetz*, 22 Id. 437; *Marshall v. Witte*, 1 Phila. 177. And see to similar effect, *Bingham v. Athna*, (Ill.) 2 Mon. Jur. 125.

(*b*) 5 & 6 Wm. 4, c. 76, s. 32; *R. v. Tart*, 1 E. & E. 618, 28 L. J. 173; and see *Monks v. Jackson*, 1 C. P. D. 683.

(*c*) *Cuming v. Toms*, 7 M. & Gr. 29 and 88.

(*d*) *Core v. James*, L. J. 7 Q. B. 185, *per Lush, J.*; *R. v. Stephens*, L. R. 1 Q. B. 702



had actually done the act was his servant, since in law the act of the latter is that of the former (*a*).

§ 106. On the other hand, Lord Tentenden's Act, 9 Geo. 4, which requires an acknowledgment "signed by the party chargeable thereby," to take a debt out of the Statute of Limitations, has been held to require personal signature, and not to admit of a signature by an agent (*b*). But this construction was based partly on the circumstance that another Statute of Limitations made express mention of an agent (*c*). Where an Act required that notices should be signed by certain public trustees, or by their clerk, it was held that the signature of the clerk of their clerk, who had a general authority from his employer to sign all documents issuing from his office, was not a compliance with the Act (*d*). [An act requiring the oath of the principal is not in general complied with by an oath of his agent.<sup>212</sup> So, *e. g.*, under an act authorizing the issuing of a distress warrant for rent, upon the oath of the person to whom the rent is due.<sup>213</sup>]

Again, where the statute required that the act should be done by the party "himself," it would hardly admit of its being done by an agent, as in the case of the provision that the nomination paper of a candidate for municipal office should be delivered to the town clerk by the candidate himself, or his proposer or seconder (*e*).

§ 107. **Liberal Construction of Remedial Acts.**—[Although] even Criminal Statutes, which are subject to the strictest construction, are found to furnish abundant illustrations of giving an extended meaning to a word (*f*), [the method of interpretation under discussion is particularly and most liberally applied to so-called remedial statutes,—statutes

(*a*) *Barnes v. Ackroyd*, L. R. 7 Q. B. 474.

(*b*) *Hyde v. Johnson*, 2 Bing. N. C. 778. See also *Swift v. Jewsbury*, L. R. 9 Q. B. 301; *Williams v. Mason*, 28 L. Times, 232; *Barwick v. London S. Bank*, L. R. 2 Ex. 259.

(*c*) See ante, § 52. [Compare, upon this subject, 3 Pars., Contr. pp. 79, et seq. But see: *Powers v. Southgate*, 15 Vt. 471, and *Orcutt v. Berrett*, 12 La. An. 178,

as to acknowledgment by wife and husband respectively, of the other's debt.]

(*d*) *Miles v. Bough*, 3 Q. B. 845.

<sup>212</sup> See *People v. Fleming*, 2 N. Y. (2 Comst.) 484; *Philadelphia v. Devine*, 1 W. N. C. (Pa.) 358.

<sup>213</sup> *Howard v. Dill*, 7 Ga. 52.

(*e*) *Monks v. Jackson*, 1 C. P. D. 688. The Munic. Corp. Act, 1882, omits "himself;" see 3rd Schedule, part 2, s. 7.

(*f*) See infra, §§ 329, 330.

"made from time to time to supply defects in the existing law, whether arising from the inevitable imperfection of human legislation, from change of circumstances, from mistake, or any other cause."<sup>214</sup> Of such statutes, as distinguished from penal statutes,<sup>215</sup> more especially is it said that they are to be construed liberally, to carry out the purpose of the enactment, suppress the mischief and advance the remedy contemplated by the Legislature;<sup>216</sup> *i. e.*, and this is all that liberal construction consists in—they are to be construed "giving the words . . . the largest, the fullest, and most extensive meaning of which they are susceptible."<sup>217</sup> The object of this kind of statutes being to cure a weakness in the old law, to supply an omission, to enforce a right, or to redress a wrong, it is but reasonable to suppose that the Legislature intended to do so as effectually, broadly and completely, as the language used, when understood in its most extensive signification, would indicate.

§ 108. **What are Remedial Acts.**—[It would, of course, be impossible to enumerate, in detail, the different classes of statutes which go to make up this great division. A few of the more prominent ones, in which the rule of liberal construction seems most generally recognized, may, however, be mentioned as illustrations. Such are statutes having for their end the promotion of important and beneficial public objects;<sup>218</sup> *e. g.*, in connection with the necessary regulation and regular supply of a great and growing city;<sup>219</sup> or curing

<sup>214</sup> Sedw. p. 32. And see *Avery v. Groton*, 36 Conn. 304.

<sup>215</sup> "Of all classifications of acts of Parliament the most important is that by which they are divided into Remedial and Penal Statutes, or rather into such as are construed liberally and such as are construed strictly." Wilb. 230.

<sup>216</sup> See *Vigo's Case*, 21 Wall. 648; *Smith v. Moffat*, 1 Barb. (N. Y.) 65; *Hudler v. Golden*, 36 N. Y. 446; *Smith v. Stevens*, 82 Ill. 554; *Chicago, etc., R. R. Co. v. Dunn*, 52 Id. 260; *Jackson v. Warren*, 32 Id. 331; *Davenport v. Barnes*, 2 N. J. L. 211; *Poor Distr. v. Poor Distr.*, 109 Pa. St. 579; *Hassenplug's App.*, 106 Id. 527; *Quinn v. Fidelity Ben. Ass'n*, 100 Id.

382; *Schuylkill Nav. Co. v. Loose*, 19 Id. 15; *Cullerton v. Mead*, 22 Cal. 95; *White v. The Mary Ann*, 6 Id. 462; *Fox v. New Orleans*, 12 La. An. 154; *Fox v. Sloo*, 10 Id. 11; *Franklin v. Franklin*, 1 Md. Ch. 342; *McCormick v. Alexander*, 2 Ohio, 74; *Lessee of Burgett*, 1 Id. 481; *Pancoast v. Ruffin*, Id. 385; *Wilber v. Paine*, Id. 256; *State v. Blair*, 32 Ind. 313; *White Co. v. Key*, 30 Ark. 603, and cases *infra*. See also *Bish., Wr. L.* § 120.

<sup>217</sup> Wilb., p. 235.

<sup>218</sup> See *New Orleans v. St. Romes*, 9 La. An. 573; *Wolcott v. Pond*, 19 Conn. 597.

<sup>219</sup> *Marshall v. Vultee*, 1 E. D. Smith (N. Y.) 294.

irregularities in the formation of school districts.<sup>220</sup> So, an act permitting the City of New York to enlarge the slips for shipping was held to include both lengthening and widening, and not to be limited to those already existing.<sup>221</sup> Similarly, the phrase "internal improvements," in a statute conferring powers in aid of such upon a municipality would not be construed to mean merely improvements internal to the town.<sup>222</sup> Such again are statutes relating to the administration of justice,<sup>223</sup> and the practice of the law;<sup>224</sup> *e. g.*, statutes permitting amendments,<sup>225</sup> giving the right of appeal,<sup>226</sup> or extending,<sup>227</sup> or preserving<sup>228</sup> the same<sup>229</sup>; providing for the arbitration of causes;<sup>230</sup> allowing the Court to open judgments, obtained by fraud,<sup>231</sup> or to open, re-examine and correct the accounts of public officers.<sup>232</sup> To illustrate: an act passed in 1857 authorized suits to be brought against fire insurance companies in the county in which "the property insured" may be located; an act passed in 1868 extended "all the provisions" of the act of 1857 to life and accident insurance companies, and it was held that suit might thereafter be brought against life insurance companies in the county where the person insured, resided, on the ground that the act of 1868 was a remedial one, and that, without this adaptation

<sup>220</sup> Stratford Sch. Distr. v. Ufford, 52 Conn. 44.

<sup>221</sup> Ibid.

<sup>222</sup> See Wetumpka v. Winter, 29 Ala. 651; also Low v. Marysville, 5 Cal. 214.

<sup>223</sup> Mitchell v. Mitchell, 1 Gill (Md.) 66. And see Russell v. Wheeler, Hamps. 3, that statutes creating limited jurisdictions are to be construed liberally as to the procedure; see §§ 152, 351.

<sup>224</sup> Receivers v. Sav. B'k, 10 N. J. Eq. 304.

<sup>225</sup> Fidler v. Hershey, 90 Pa. St. 363; so as to apply to equity proceedings as well as actions at law: Dick's App., 106 Id. 589, 596; and to authorize an amendment of a declaration after verdict and before judgment: Bolton v. King, 105 Id. 78.

<sup>226</sup> Pearson v. Lovejoy, 53 Barb. (N. Y.) 407. An act requiring the court, upon request, to reduce its "opinion" to writing and file the

same of record, for purposes of review by a court of errors, was held to embrace charges delivered to juries, as well as what is more technically called an opinion: Wheeler v. Winn, 53 Pa. St. 122, 127; Downing v. Baldwin, 1 Serg. & R. (Pa.) 298, 300.

<sup>227</sup> Converse v. Burrows, 2 Minn. 229.

<sup>228</sup> Arceneaux v. Benoit, 21 La. An. 673.

<sup>229</sup> So provisions requiring assessors to sit to revise assessments, are to be liberally construed in favor of tax payer: Walker v. Chicago, 56 Ill. 277.

<sup>230</sup> Tuscaloosa Bridge Co. v. Jemison, 33 Ala. 476. But see Burnside v. Whitney, 21 N. Y. 148, contra.

<sup>231</sup> Sharp v. New York, 31 Barb. (N. Y.) 572.

<sup>232</sup> White Co. v. Key, 30 Ark. 603.

of the phrase "property insured" to the subject matter of the enactment" the provision would be meaningless.<sup>223</sup> Again, where an act directed the court of common pleas out of which any commission in the nature of a writ de lunatico inquirendo should issue, to decide and direct who should pay all the costs attendant upon the issuing and execution of such commission, or to apportion the costs as the justice of the case might require, it was held, that the act, being a remedial act, was to be liberally construed, so as to authorize such disposition of the costs of the entire proceeding, including a traverse of the inquisition, etc.; to final judgment.<sup>224</sup> To the same category belong statutes allowing the original owner of real estate to redeem the same from tax-sales;<sup>225</sup> especially when providing an indemnity for the purchaser and imposing a penalty on the delinquent;<sup>226</sup> statutes providing indemnity for loss accruing to a citizen by means of a privilege given by the Legislatures to another,<sup>227</sup> or intended to legitimate the issue of marriage otherwise void.<sup>228</sup>

§ 109. [Upon a similar principle, it would seem, it has been declared, that, where the object of a statute is to confer a bounty, ambiguities in its provisions are to be construed liberally in favor of the intended beneficiaries.<sup>229</sup> And so in the case of statutes providing compensation to public officers.<sup>230</sup>]

§ 110. **Extension beyond Letter.**—Sometimes the governing principle of the remedial enactment has been extended to cases not included in its language, to prevent a failure of justice, and consequently of the probable intention. Thus, the Common Law Procedure Act of 1854, s. 50, which empowered a Court, upon the application of either party to

<sup>223</sup> *Quinn v. Fidelity Ben. Ass'n*, 100 Pa. St. 382. See ante, § 101, and note 194.

<sup>224</sup> *Hassenplug's App.*, 106 Pa. St. 527.

<sup>225</sup> *Alter v. Shepherd*, 27 La. An. 207; *Jones v. Collins*, 16 Wis. 594.

<sup>226</sup> *Corbett v. Nutt*, 10 Wall. 464.

<sup>227</sup> *Boston, etc., Co. v. Gardner*,

2 Pick. (Mass.) 33, 37. And see *New York v. Lord*, 17 Wend. (N. Y.) 285; ante, § 103.

<sup>228</sup> *Brower v. Bowers*, 1 Abb. App. Dec. (N. Y.) 214. See *Baity v. Cranfield*, 91 N. C. 293, post, § 280.

<sup>229</sup> See *Ross v. Doe*, 1 Pet. 655; *Roane v. Innes*, Wythe (Va.) 62.

<sup>240</sup> See *U. S. v. Morse*, 3 Story, 87.

a cause, supported by the affidavit of such party, of his belief that a material document was in the possession of his opponent, to order its production, though it did not admit the affidavit of the attorney of the party, even when the latter was abroad (*a*), was satisfied by the attorney's affidavit, where the party was a corporation, and consequently incapable of making an affidavit, or, perhaps, of forming a belief (*b*). The governing principle was that all suitors should have power of getting discovery (*a*); and as a corporation could make no affidavit, or could make one only by their attorney, the affidavit of the latter was considered a substantial compliance with the Act. [A statute providing a remedy on official bonds "not in the penalty payable and conditioned as prescribed by law," was held applicable in the case of an official bond conditioned as prescribed by law, but not executed, approved or filed within the time prescribed.<sup>241</sup> And where an act provided that the county in which an indictment was found should pay the costs "in all cases where the defendant is sentenced to imprisonment in the county jail, or to pay a fine, and is unable to pay them," it was held, in a case disposed of by an agreement between the prosecuting attorney and the defendant, that the prosecution should be dismissed at the latter's costs, that, upon his inability to pay the costs, the county was liable to pay them, including the expenses of execution for the same issued against the defendant.<sup>242</sup> But this principle of con-

(*a*) *Christopherson v. Lotinga*, 15 C. B. N. S. 809; *Herschfield v. Clarke*, 11 Ex. 712, 25 L. J. Ex. 113.

(*b*) *Kingsford v. G. W. R. Co.*, 16 C. B. N. S. 761, 33 L. J. C. P. 307.

(*a*) *Per Erle, C. J., Id.* [On the principle that the chief object of an act was to dispense with the services of an attorney, it was held, that, under authority conferred by the act to enter judgment upon an instrument which confessed judgment or contained a warrant for an attorney at law or other person to confess judgment, the prothonotary might enter judgment upon an instrument which empowered "any attorney or prothonotary"

to do so: *Cooper v. Shaver*, 101 Pa. St. 547.]

<sup>241</sup> *Sprowl v. Lawrence*, 33 Ala. 674.

<sup>242</sup> *State v. Buchanan Co. Ct.*, 41 Mo. 254; the agreement being deemed to have the same effect, so far as the costs were concerned, as a conviction and sentence. Similarly it was held, in *State v. Manning*, 14 Tex. 402, that a statute giving an appeal when a judgment shall be given for the defendant, on a motion to quash indictment, gave an appeal, where the indictment was abated by plea, the legal effect being the same in both cases. It will be observed that the construction illustrated by the above decisions is close upon the line of what is

struction whereby the operation of a statute may sometimes be judicially extended beyond its words, does not apply, even in the remedial statutes, where the words are too explicit to admit of belief that such extension was intended.<sup>243</sup> Consequently an act in Connecticut validating all "deeds . . of real estate in the state. . . executed and acknowledged in any other state. . . in conformity with the laws of such state . . relative to the conveyance of lands therein situated" was held not to validate a deed executed in New York conveying lands in Connecticut, acknowledged in New York before a Connecticut commissioner, but deficient under the laws of Connecticut by being attested by only one witness,—such commissioner having no authority under the laws of New York to take acknowledgments of lands there situated.<sup>244</sup>]

§ 111. The beneficial spirit of construction is also well illustrated by cases where there is so far a conflict between the general enactment and some of its subsidiary provisions, that the former would be limited in the scope of its operation if the latter were not restricted. An Act which, after authorizing the imposition of a local rate on all occupiers of land in a parish, gives a dissatisfied ratepayer an appeal, but at the same time requires the appellant to enter into recognizances to prosecute the appeal, presents such a conflict. Either it excludes corporations from the right of appeal, because a corporation is incapable of entering into recognizances; or it extends the right to them, without compliance

technically known as "equitable" construction. There is probably no difference between the "equitable" construction and the "liberal" construction, as these terms are, in modern decisions, practically applied. Indeed, they are so often used as interchangeable, and to express the same idea, that, where they occur, it is necessary to ascertain whether they are used in the technical sense or not. It will be seen hereafter that most of the modern instances of "equitable" construction are really nothing but "liberal" constructions, and might, with propriety, be, cited in this connection. Nevertheless, the

phrase "equitable" construction has had, if it does not now have, a distinct and peculiar meaning, and is still sometimes used by judges to indicate something a trifle beyond "liberal" construction. It is, therefore, deemed advisable to retain the title as a separate one, and to leave it where it would, in strictness, belong, under the head of Exceptional Construction: See post, §§ 320, seq., and to refer to it the cases of liberal construction purporting to be decided under the doctrine of equitable construction.

<sup>243</sup> *Farrell Foundry v. Dart*, 26 Conn. 376.

<sup>244</sup> *Ibid.*

with that special exigency. And the latter would be unquestionably the beneficial way of interpreting the Statute. The general and paramount object of the Act would receive full effect by giving to corporate bodies the same right of appeal against the burthen imposed on them; and the subsidiary provision would be understood as applicable only to those who were capable of entering into recognizances (*a*),—[analogously, as to the former, with the principle of testamentary interpretation, that, the general intent of the testator being ascertained, particular expressions that would stand in its way are to be construed in subordination to it or disregarded.<sup>365</sup>]

The Mortmain Act, which prohibits the disposition of lands to a charity by other means than by a deed executed a year before the donor's death, was open to the construction that it applied only to lands which passed by deed, and therefore not to lands of copyhold tenure (*b*). But as the object of the Statute was, manifestly, to include all lands of whatever tenure in its prohibition, the only consequence that would have followed, if it had been thought impossible that the mode of conveyance provided by the Statute should operate to transfer copyholds, would have been that copyholds would have fallen within the general prohibition absolutely, and would have been incapable of passing to a charity by any mode of conveyance (*c*).

§ 112. **Extension to New Things.**—Except in some few cases where a statute has fallen under the principle of excessively strict construction the language of a statute is generally extended to new things which were not known and could not have been contemplated by the legislature when it was passed. This occurs, when the Act deals with a genus, and the thing which afterwards comes into existence is a species of it (*d*). Thus, the provision of Magna Charta which exempts lords from the liability of having their carts taken for carriage was held to extend to degrees of nobility not

(*a*) *Cortis v. Kent Waterworks*, 7 B. & C. 314. [*S. P.*, *Williams v. McDonal*, 4 Chand. (Wis.) 65.]

<sup>365</sup> See *Musselman's Est.*, 5 Watts (Pl.) 9; 3 Jarm., Wills, 282.

(*b*) *Comp. Smith v. Adams*, sup. § 36.

(*c*) *Per* Lord Tenterden in *Doe v. Waterton*, 3 B. & A. 151.

(*d*) *Per* Bovill, C. J., in *R. v. Smith*, L. R. 1 C. C. 170; *per* Holt, C. J., in *Lane v. Cotton*, 12 Mod 485.

known when it was made, as dukes, marquises, and viscounts (a). The 17 Geo. 2 (A. D. 1744), which gave parishioners the right of inspecting the accounts of churchwardens and overseers under the poor law of Elizabeth, was held to extend to those of guardians, officers who were created by Gilbert's Act (22 Geo. 3), passed in 1783 (b). The 13 Eliz. c. 5, which made void, as against creditors, transfers of lands, goods and chattels, did not originally apply to copyholds or choses in action, as these were not seizable in execution (c); but when they were made subject to be so taken (1 & 2 Vict. c. 110), they fell within the operation of the Act (d). The Act of Geo. 2, which protects copyright in engravings by a penalty for piratically engraving, etching, or otherwise, or "in any other manner" copying them, extends to copies taken by the recent invention of photography (e). [A statute authorizing counties to take stock in railroads is applicable to stock of railroads organized under a subsequent statute;<sup>246</sup> and the operation of a law for regulating "all existing railroad corporations," extends to railroads incorporated after, as well to those incorporated before its passage, unless excepted from its provisions by their charters.<sup>247</sup> So a provision in a statute in favor of an alien "who shall have resided within the state two years," applies to future and past residence alike.<sup>248</sup> And under an act providing that the expenses of the borough and township elections, in a certain county, "held in March annually," should be paid by the borough and townships respectively, they remained liable for the expenses of such elections, notwithstanding a subsequent change, by statute, in the date of the

(a) 2 Inst. 35.

(b) 17 Geo. 2, c. 38; 22 Geo. 3, c. 83; *R. v. Great Farringdon*, 9 B. & C. 541; *Bennett v. Edwards*, 7 B. & C. 586; 6 Bing. 230.

(c) *Sims v. Thomas*, 12 A. & E. 536.

(d) *Norcutt v. Dodd*, Cr. & Ph. 100; *Barrack v. McCulloch*, 26 L. J. Ch. 105, 3 K. & J. 110; *R. v. Smith*, L. R. 1 C. C. 270, *per* Bovill, C. J.

(e) *Gambart v. Ball*, 14 C. B. N. S. 306; 32 L. J. C. P. 166; *Graves*

*v. Ashford*, L. R. 2 C. P. 410; *Atty.-Genl. v. Lockwood*, 9 M. & W. 378; *Barber v. Tilson*, 3 M. & G. 429. See other instances, *Re Taylor*, 10 Sim. 291; *Exp. Arrow-smith*, 8 Ch. D. 96; and cases cited *infra*, chap. xii.

<sup>246</sup> *Stebbins v. Pueblo Co.*, 2 McCrary, 196.

<sup>247</sup> *Indianapolis, etc., R. R. Co. v. Blackman*, 63 Ill. 117.

<sup>248</sup> *Beard v. Rowan*, 1 McLean, 135.



same; nor did the conversion of a borough into a city affect its liability under the act;<sup>249</sup> just as the Massachusetts act of 1817, ch. 50, providing that prosecutions under the by-laws of Boston might be in the name of the commonwealth, remained unchanged, in that particular, by the act which incorporated the town of Boston as a city.<sup>250</sup> Thus again, a provision of an act giving justices of the peace civil jurisdiction in cases involving not more than \$100, made the judgment of the court of common upon certiorari to the judgment of such justices final, and forbade the issuing of a writ of error to the same by the Supreme Court; and it was held that this provision applied to certioraris in suits under a later act increasing the civil jurisdiction of justices to \$300.<sup>251</sup> Similarly, where a corporation originally incorporated as a road and bridge company, was by a subsequent statute permitted to form itself into two companies, one a turnpike, the other a bridge company, it was held that the penalties imposed by the original act upon the officers of the corporation created by it extended to the officers of the new turnpike company.<sup>252</sup> So, an act dividing a county, and creating, out of a portion of the old county, a new one, with a new name, was held not to repeal, as to the latter the special laws in force in the whole territory covered by the original county, but the same were held to extend to and remain in force in the new county.<sup>253</sup>

<sup>249</sup> *Crawford Co. v. Meadville*, 101 Pa. St. 578.

<sup>250</sup> *Com'th v. Worcester*, 3 Pick. (Mass.) 462. *Comp. Smith v. People*, 47 N. Y. 330, *supra*, § 43, note (a), p. 54.

<sup>251</sup> *Pa., etc., Co. v. Stoughton*, 106 Pa. St. 458. In New York, an act passed in 1876 gave to cleaning women at the State Hall the same per diem compensation as was paid to cleaning women at the Capitol, then \$2. After the Capitol then used had been abandoned for the new Capitol, it was held they were still entitled to that pay, no change in the pay of cleaning women employed in the new Capitol having been shown: *Pool v. State* (N. Y.) 10 East. Rep. 365.

<sup>252</sup> *Kane v. People*, 8 Wend. (N.

Y.) 203. The act allowing the division extended the penalties of the old act to the officers of the bridge company, a circumstance which was referred to by the court as aiding it in arriving at the construction stated. It is to be observed, that, in both in this decision and that of *Crawford Co. v. Meadville*, *supra*, it was declared by the courts, as a ground for their decision, that the later acts were not intended to change the existing law beyond the immediate purposes of the enactment: see next chapter.

<sup>253</sup> *Lackawanna Co. v. Stevens*, 105 Pa. St. 465; and see *Parsons v. Winslow*, 1 Grant (Pa.) 160. In *Lumpkin v. Muncey*, 66 Tex. 311, it is said that an act creating

[A statute limiting the time or place within which or where a designated class of offences may be prosecuted or tried, applies to offences of the same class created and punished by subsequent enactments.<sup>254</sup>]

new counties does no more than provide for their organization, and until the new county is actually organized or attached to some other county or district, its territory remains subject to the old jurisdiction. But the New Jersey act of 21 March, 1881, dividing the 8th Assembly district, and, with other territory, making two districts, one of which, however, was called the 8th, was, for obvious reasons, held to repeal by implication the

special provision of the act of 23 March, 1875, requiring one of the two freeholders from the 8th district to be from the western, and the other from the eastern part thereof: *Mulligan v. Cavanagh*, 46 N. J. L. 45.

<sup>254</sup> Bish., *Wr. L.*, § 126, citing the following American cases: *Johnson v. U. S.* 3 McLean, 89; *U. S. v. Ballard*, Id. 469; *Ottawa v. La Salle*, 12 Ill. 339.

## CHAPTER V.

PRESUMPTIONS ARISING FROM SCOPE AND SPECIFIC PURPOSE  
OF ACT, AND AS TO EVASION AND ABUSE OF POWER.

- § 113. Presumption against Needless Change of Law.
- § 114. Application of the Rule.
- § 127. Change of Common Law.
- § 129. Intent as an Element of Crime.
- § 130. Incapacity, etc.
- § 131. Acts done in Assertion of Right.
- § 132. Ignorance as a Defense.
- § 135. Liability of Master for Servant's Act.
- § 136. Mens Rea and Guilty Mind.
- § 137. Restriction of General Terms to Particular Parties.
- § 138. Presumption Against Permitting Evasion.
- § 144. Limits of the Rule.
- § 146. Presumption Against Permitting Abuse of Power.
- § 147. Judicial Discretion.
- § 148. Limits of Discretion Conferred on Officers.
- § 149. Discretion to be Exercised in Individual Cases.

§ 113. **Presumption against Needless Change of Law.**—Before adopting any proposed construction of a passage susceptible of more than one meaning, it is important to consider the effects or consequences which would result from it (*a*), for they often point out the genuine meaning of the words (*b*). There are certain objects which the Legislature is presumed not to intend; and a construction which would lead to any of them is therefore to be avoided. It is found sometimes necessary to depart, not only from the primary and literal meaning of the words, but also from the rules of grammatical construction, when it is improbable that they express the real intention of the Legislature; it being more reasonable to hold that the Legislature expressed its intention in a

(*a*) Grot. de B. & P. b. 2, c. 16, s. 4; U. S. v. Fisher, 2 Cranch, 590, *per Cur.* [Hines v. R. R. Co., 95 N. C. 434.] See ante, § 4, as to when consequences may be considered.

(*b*) Puff. L. N. b. 5, c. 12, s. 8.

slovenly manner, than that it intended something which it is presumed not to intend.

One of these presumptions is that the Legislature does not intend to make any alteration in the law beyond what it explicitly declares (*a*), either in express terms or by unmistakable implication; or, in other words, beyond the immediate scope and object of the statute (*a*). In all general matters beyond, the law remains undisturbed. It is in the last degree improbable that the Legislature would overthrow fundamental principles, infringe rights, or depart from the general system of law, without expressing its intention with irresistible clearness (*b*); and to give any such effect to general words, simply because, in their widest and perhaps natural sense, they have that meaning, would be to give them a meaning in which they were not really used. It is, therefore, an established rule of construction that general words and phrases, however wide and comprehensive in their literal sense, must be construed as strictly limited to the immediate objects of the Act, and as not altering the general principles of the law (*c*); [*i. e.*, they are to be construed as near the use and reason of the prior law as may be, without violation of their obvious meaning.']

§ 114. **Application of the Rule.**—Thus, a Statute which authorized “any” or “the nearest” justice of the peace to try certain cases, would not authorize a justice to try any such cases out of the territorial limits of his own jurisdiction (*d*); or in which he had a disqualifying interest (*e*); or which he was incapacitated by any other general principle of law from hearing (*f*); or to hear them by

(*a*) *Per* Trevor, J., in *Arthur v. Bokenham*, 11 Mod. 150; see also *Harbert's Case*, 3 Rep. 13b. [*Lee v. Forman*, 3 Metc. (Ky.) 114; *McAfee v. R. R. Co.*, 36 Miss. 669; *Paramore v. Taylor*, 11 Gratt. (Va.) 220; *Schepp v. City of Reading*, 2 Woodw. (Pa.) 460; *Kerlin v. Bull*, 1 Dall. (Pa.) 175.]

(*b*) 2 Cranch, 390.

(*c*) *Per* Sir J. Romilly in *Minet v. Leman*, 20 Beav. 278, 24 L. J. Ch. 547; *Wear Commissioners v. Adamson*, 1 Q. B. D. 546, *per* Mellish, L. J., 2 App. 783.

<sup>1</sup> *Cadbury v. Duval*, 10 Pa. St. 265, 270; *Ihmsen v. Navigation Co.*, 32 Id. 153, 157; *Com'th v. Shopp*, 1 Woodw. (Pa.) 123, 129. And see 1 Kent, Comm. 464.

(*d*) 1 Hawk. P. C., c. 65, s. 45; *Re Peerless*, 1 Q. B. 153; *R. v. Fylingdales*, 7 B. & C. 438.

(*e*) *R. v. Cheltenham*, 1 Q. B. 467.

(*f*) *Bonham's Case*, 8 Rep. 118a; *Great Charte v. Kennington*, 2 Stra. 1173; *R. v. Sainsbury*, 4 T. R. 456.

any other course of proceeding than that established by law (a). So, the Debtors Act, 1869, which empowers "any (inferior) Court" to commit for default of payment of a debt under fifty pounds, in pursuance of an order or judgment of "that or any other competent Court," did not authorize such a Court to commit, unless the debtor was subject to its general jurisdiction by residence or business (b). An Act which authorized a distress would not authorize a seizure of goods in custodia legis (c). [And foreign attachments, under statutes authorizing such, being held to lie only for the recovery of debts or damages arising ex contractu,<sup>2</sup> an act providing that, "where two or more persons shall be jointly but not severally liable to the suit of another, if one or more of such persons shall be liable to attachment as aforesaid, and another, or others shall not be liable to such process," an attachment may be issued against the former and a summons against the latter, was held confined to its object of giving the action when one of the joint debtors resided out of the state and had property within it, and not to change the rule limiting the remedy by foreign attachment to claims ex contractu, to the exclusion of demands founded in tort.\*] The provision in the Judicature Act of 1873, that the Court might grant an injunction in all cases in which it should consider it "just and convenient" that such an order should be made, did not extend the authority of the Court beyond cases where there is an invasion of recognized legal or equitable rights (d). [An act provided, that, in all proceedings in courts of law and equity, in which it should be alleged that the private rights of a party, etc., were injured or invaded by any corporation claiming to have a right or franchise to do the act from which such injury resulted, it should be the duty of the court to

(a) Dalt. c. 6, s. 6.

(b) 32 & 33 Vict. c. 62; Washer v. Elliot, 1 C. P. D. 169.

(c) 17 & 18 Vict. c. 104, s. 523; The Westmoreland, 2 W. Rob. 394.

<sup>2</sup> See Jacoby v. Gogell, 5 Serg. & R. (Pa.) 450; Porter v. Hildebrand, 14 Pa. St. 129. And see

Barnes v. Buck, 1 Lans. (N. Y.) 268.

<sup>3</sup> Boyer v. Bullard, 102 Pa. St. 555.

(d) Sect. 25, sub-s. 8; Beddow v. Beddow, 9 Ch. D. 89; Day v. Brownrigg, 10 Ch. D. 294; and *per* Lord Hatherley, in Reuss v. Bos, L. R. 5 App. 193.

examine and ascertain whether such corporation in fact possessed the right or franchise thus claimed by it. It was held that this act merely enabled private citizens to call upon a corporation to show, by its charter, that it had the power to do a certain act, and permitted him to show, from the charter, that the powers once possessed by the corporation had been lost by lapse of time, or other cause appearing from the conditions or limitations of the charter itself; but did not alter the law forbidding any but the Commonwealth to inquire into extraneous causes of forfeiture, as, *e. g.*, non-user.<sup>4</sup>] The provisions in Order 55, Rule 1, of the Judicature Act and the Regulation of Railways Act, 1873, that the costs of and incidental to proceedings shall be in the discretion of the Court was construed as giving no wider discretion than had always been exercised by the Court of Chancery, and therefore as not authorizing an order on a successful defendant to pay a portion of the plaintiff's costs (*a*).

An Act which provided that a mayor should not be, by reason of his office, ineligible as a town councillor or alderman, would not make him eligible when he acted in the judicial capacity of returning officer at the election; for it would not be a just construction of the language used, or a legitimate inference from it, that the legislature had intended to repeal by a mere sidewind the principle of law that a man cannot be a judge in his own case (*b*). [Upon the same principle, it was held, that, under an act unqualifiedly empowering justices of the peace to take the separate acknowledgment of married woman of their free and voluntary execution of deeds conveying their property or interest in property of the husband, a magistrate bound to make title himself or by a conveyance from a third party is incompetent to receive the acknowledgment of the grantor's wife.<sup>5</sup>] So, an Act which directed the election of officers would be understood

<sup>4</sup> Western Pa. R. R. Co.'s App., 104 Pa. St. 399. Comp. on this subject, Endlich Build'g Ass'ns, §§ 504, 512, and cases there referred to.

(*a*) Foster v. G. W. R. Co., 51 L. J. Q. B. 233. [Comp. Com'th v. Quinter, 2 Woodw. (Pa.) 377.]

(*b*) R. v. Owens, 2 E. & E. 86,

28 L. J. 316; R. v. Tewkesbury, L. R. 3 Q. B. 639; R. v. Milledge, 4 Q. B. D. 332, S. C. nom. R. v. Weymouth, 48 L. J. 189.

<sup>5</sup> Withers v. Baird, 7 Watts (Pa.) 227. That the taking of such acknowledgment is a judicial act, see, *Ibid.*; Jamison v. Jamison, 3 Whart. (Pa.) 457; Loudon v.

as authorizing it only on a lawful day, and not on a Sunday (a); and if it declared that the candidate who had the major ity of votes should be deemed elected, it would be construed as not intending to override the general principle, that voters who vote for a person whom they know to be ineligible, throw away their votes (b).

§ 115. In the same way, a statute requiring a recognizance would not be understood as giving competency to minors and married women to bind themselves by such an instrument (c). The Wills Act of Hen. 8, which empowered "all persons" to devise their lands, did not legalize a devise of land to a corporation (d), nor would it have enabled lunatics or minors to make a will, even if the 33 & 34 Hen. 8, s. 14, had not been passed to prevent a different construction (e). The object of the Legislature was, obviously, only to confer a new power of disposition on persons already of capacity to deal with their property, not to relieve from disability from disposing or taking those who were under such incapacity. [So, where an act gave to all persons of full age and sound mind the right to dispose of their real estate, as well by last will and testament in writing, as otherwise, by any act executed in his or her life-time, it was held not to extend to married women, on the ground that it was not the design of the Legislature to alter the relation between husband and wife, or the legal effect of that relation by mere implication from language not expressing any such intention.<sup>6</sup> Nor does an act pro-

Blythe, 16 Pa. St. 532, 540; Heeter v. Glasgow, 79 Id. 79; Singer Man. Co. v. Rook, 84 Id. 442; Com'th v. Haines, 97 Id. 228; Homœop. Life Ins. Co. v. Marshall, 32 N. J. Eq. 103. And as to the principle that interest disqualifies for a judicial act, see Cooley, C. L., 508-511.

(a) R. v. Butler, 1 W. Bl. 649; R. v. Bridgewater, Cowp. 189.

(b) R. v. Coaks, 3 E. & B. 249, 23 L. J. 133; R. v. How, 33 L. J. M. C. 53; Campbell v. Maund, 5 A. & E. 865; R. v. St. Matthew, 33 Law Times, N. S. 558; R. v. Wimbledon Loc. Board, 51 L. J. Ch. 219.\* [So, "entitled," in a statute, means legally entitled: *In re Coldfield Grammar School*, 7

App. C. 91; *In re Free Grammar School*, 12 Id. 444, 450.]

(c) *Custodes v. Jinks*, Styles, 283; *Draper v. Glenfield*, Bulstr. 345; *Coleman v. Birmingham*, 6 Q. B. D. 615; 20 L. J. 92 (see 33 & 34 Vict. c. 93, s. 14).

(d) 23 Hen. 8, c. 1; *Jesus College Case*, Duke, Charit. Uses, 78; *Braneth v. Havering*, Id. 83; *Christ's Hospital v. Hawes*, Id. 84.

(e) *Beckford v. Wade*, 17 Ves. 91; comp. *O'Shanassy v. Joachim*, 1 App. 82; and as to married women, before the 45 & 46 Vict. c. 75, see *Willock v. Noble*, L. R. 7 H. L. 580; *Doe v. Bartle*, 5 B. & A. 492.

<sup>6</sup> *Osgood v. Breed*, 12 Mass. 530; *Wilbur v. Crane*, 13 Pick.

\* See *Addenda*.

viding that "any married female may take . . . convey and devise real or personal property," authorize a married female infant to devise real estate.] The 43 Eliz. c. 2, in making the mother and grandmother of an illegitimate child liable to maintain it, did not reach them when under coverture, and so in a state of inability to perform that duty (*a*); and an Act which punished "every person" who deserted his or her children would not apply to a married woman whom her husband had deserted (*b*). [Nor is one, who, in his official capacity, makes, and incorporates in his official report, sketches and the like, to be deemed the "author" of the same within the copy-right laws.] So, the enactment which gave a vote for the election of town councillors to every "person" of full age who had occupied a house for a certain time, and provided that words importing the masculine gender should include females for all purposes relating to the right to vote, was held, having regard to the general scope of the Act, to remove only that disability which was founded on sex, but not to affect that which was the result of marriage as well as sex, and therefore not to give the right of voting to married women (*c*). An Act which simply left the determination of a matter to a majority of vestrymen "present at

(Mass.) 284. It is said, that, in lay as well as legal writings, the word "all" is frequently and carelessly used where its generality is to be restricted by context and intention: *Phillips v. Saunders*, 15 Ga. 518. So the phrase "every case," in La. Civ. Code, § 3521, was held to mean every class of cases or subject matter expressly legislated upon in the Code: *D'Apremont v. Berry*, 6 La. An. 464.

<sup>1</sup> *Zimmerman v. Schoenfeldt*, 6 Th. & C. (N. Y.) 142; 3 Hun, 692.

(*a*) *Bennett v. Watson*, 3 M. & S. 1; *Exp. Barrow*, 3 Ves. 554; *Hussey's Case*, 9 Rep. 73. [An act authorizing the court of Quarter Sessions to order children to support their indigent and disabled parents, was held not to relieve the poor-district from the legal liability to provide for such persons not having a settlement there,

until they could be removed to the place of their last settlement: *Kelly Tp. v. Union Tp.*, 5 Watts & Serg. (Pa.) 535.]

(*b*) *Peters v. Cowie*, 2 Q. B. D. 131.

<sup>8</sup> *Heine v. Appleton*, 4 Blatchf. 125. Nor an official reporter of judicial decisions, except as to the headnotes prefixed to his reports of cases: *Wheaton v. Peters*, 8 Pet. 591, 698; *Little v. Gould*, 2 Blatchf. 165.

(*c*) 32 & 33 Vict. c. 55, s. 9; *R. v. Harrauld*, L. R. 7 Q. B. 361; see *Chorlton v. Lings*, L. R. 4 C. P. 374. [See *Thicknesse, Husb. and W.*, at p. 19: "When the result is not revolutionary but remedial, and consistent with another act, made the following session, the word 'person' will be interpreted in its natural meaning, and will include not only a single woman, but a married one also."]



the meeting" would not affect the common law right of the minority to demand a poll; and the "meeting" would therefore be understood as continuing until the end of the poll (*a*).

A charitable provision for the support of "maimed" soldiers would not extend to soldiers who had been maimed in the service of a foreign state, or in punishment for a crime (*b*). A statute which enacted that "every conveyance" in a particular form should be "valid," would not receive the sweeping effect, so foreign to its object, as that of curing a defect of title (*c*). [Nor will a statute authorizing a county to convey to the State certain lands "as the said county shall now hold by virtue of tax deeds issued upon sales for delinquent taxes heretofore made," validate, or apply to land held by the county, under tax-deeds void on their face; and this, although, in fact, there were no lands to which the act, thus construed, could apply.\* So a statute declaring of full force all ordinances of a city, etc., "in operation" at the date of its passage, has no effect upon one, which, before that time, had been judicially pronounced inoperative.<sup>10</sup> Again an act validating certain sales made by persons in a fiduciary capacity in the event of any irregularity or defect existing in the appointment or qualification of such trustee, etc., cures only defects in the proceedings where the court had jurisdiction of the subject matter, and does not validate a sale made by a trustee, etc., who was irregularly and defectively appointed or qualified by a court that had no jurisdiction to make such an appointment.<sup>11</sup>]

§ 116. So, the Tithe Commutation Act, in declaring maps made under its provisions, "satisfactory evidence" of the matters therein stated, would not have the effect of making them evidence on a question of title between landowners, a

(*a*) 5 & 6 Wm. 4, c. 76, s. 18; R. v. How, 33 L. J. M. C. 53 (Q. B.); White v. Steel, 12 C. B. N. S. 383, 31 L. J. 265; R. v. St. Mary, 3 Nev. & P. 416; R. v. D'Oyley, 12 A. & E. 139.

(*b*) Duke, Charit. Uses, 134.

(*c*) Ward v. Scott, 3 Camp. 284;

see also Whidborne v. Eccles. Com., 7 Ch. D. 375, 47 L. J. 129; Forbes v. Eccles. Com., 15 Eq. 51.  
<sup>9</sup> Haseltine v. Hewitt, 61 Wis. 121.

<sup>10</sup> Allen v. Savannah, 9 Ga. 286.

<sup>11</sup> Halderman v. Young, 107 Pa. St. 324.

matter foreign to the scope of the Act (*a*). So, a ship built in England for a foreigner would not be a "British ship" within the provisions requiring registration and transfer by bill of sale, even while still the property of the English builder (*b*). [Nor did the New Jersey statute declaring every warrant of attorney for the confession of judgment, included in any bond, bill, or other instrument, void, prohibit the making, in that state, of such warrant of attorney for use in other states.<sup>12</sup>] The Bankrupt Act, which makes a composition accepted under certain circumstances by creditors binding on all creditors "whose names are shown in the debtor's statement," with the proviso that it "shall not affect any other creditor," would exclude only non-assenting creditors, but not creditors whose names were not stated in the debtor's statement, if, in fact, they assented; for it would be understood as not intending to interfere with the general principle that it is competent to a person to bind himself by such an assent (*c*). The 12 Car. 2, c. 17, which enacted that all persons presented to benefices in the time of the Commonwealth, and who should conform as directed by the Act, should be confirmed therein, "notwithstanding any act or thing whatsoever," was obviously not intended to apply to a person who had been simoniacally presented (*d*). It is evident that a literal construction would, in these cases, have carried the operation of the Act far beyond the intention.

So, the sixth section of the Habeas Corpus Act which, for the prevention of unjust vexation by reiterated commitments for the same offense, enacts that no person who has been discharged on habeas corpus shall be imprisoned again for "the same offense," except by the Court wherein he is bound by recognizances to appear, or other Court having jurisdiction in the cause, would not extend to a case where the discharge was made on the ground that the commitment

(*a*) 6 & 7 Wm. 4, c. 71, s. 64; L. 555.

Wilberforce v. Hearfield, 5 Ch. D. 709.

(*b*) Union Bank v. Lenanton, 3 C. P. D. 243.

<sup>12</sup> Hendrickson v. Fries, 45 N. J.

(*c*) 32 & 33 Vict. c. 71, s. 126; Campbell v. Im Thurn, 1 C. P. D. 267.

(*d*) Crawley v. Philips, Sid. 232.

had been made without jurisdiction, though the offence for which he was arrested on the second occasion was the same; for this was obviously beyond the object of the Act (a).

The statutory provision for the restoration of stolen goods to the owner, on conviction of the offender, was construed as applying only to cases where the property in the goods continued in him, but not as authorizing a restoration when the property had vested in an innocent purchaser (b). [And the confirmation of titles declared by the Act of Congress of 22d July, 1866, was held not to apply to lands as to which an adverse pre-emption, homestead, or other right had been acquired at the date of the passage of the act, by any settler under the United States laws.<sup>17</sup>]

§ 117. So, it was held that the provision of the Statute of Limitations, 3 & 4 Will. 4, c. 27, s. 26, which deprives the owner of lands of the right of suing in equity for their recovery, on the ground of fraud, from a purchaser who did not know or have reason to believe that any such fraud had been committed, was to be construed subject to the presumption that the Legislature had not intended, by its general language, to subvert the established principles of equity on the subject of constructive notice; and was therefore read as meaning that the purchaser did not know or have reason to believe, either by himself, or by some agent whose knowledge or reason to believe is, in equity, equivalent to his own (c). [And similarly, a statutory provision that every deed and conveyance which shall not be recorded within a certain period after execution, shall be deemed fraudulent and void as against any subsequent purchaser or mortgagee for valuable consideration, protects only bona fide purchasers and mortgagees for a valuable consideration, without notice;<sup>18</sup> and, moreover, the purchaser protected is only the purchaser of the same title, the purchaser of an adverse title

(a) 31 Car. 2, c. 2; Atty.-Genl. v. Kwok Ah Sing, L. R. 5 P. C. 179.

(b) 24 & 25 Vict. c. 96, s. 100; Moyce v. Newington, 1 Q. B. D. 32.

<sup>17</sup> Keeran v. Griffith, 34 Cal. 580.

(c) Vane v. Vane, L. R. 8 Ch. 383.

<sup>18</sup> Union Canal Co. v. Young, 1 Whart. (Pa.) 410, 432; Hoffman v. Strohecker, 7 Watts (Pa.) 86, 90 Jaques v. Weeks, Id. 261.

not being within the scope of the act." And an act providing that a bona fide assignee of an usurious contract may recover against the usurer the amount of the consideration paid by him for the same, less the amount of the principal, was held not to apply to an indorser of a promissory note with notice that it was tainted with usury.<sup>17</sup>]

§ 118. The provision of the Factors Act, which enacts that "any agent intrusted with the possession of goods" shall be deemed their owner, so far as to give validity to a pledge of them, is confined by the general scope and object of the enactment to mercantile agents and transactions; and would therefore not give validity to a pledge of household furniture, not in the way of trade, made by an agent to whose possession it had been entrusted (*a*). [So, an act which declared, that, when any mariners or others are gone or thereafter shall go to sea, leaving their wives at shop-keeping, or to work for their livelihood, such wives shall be deemed and declared feme sole traders, with capacity to sue and be sued, was held to make a woman so entitled and liable only when engaged in trade or business, and a subsequent statute of much wider range, but declaring that married women embraced in its provisions should have all the rights and privileges secured by the former and be subject as therein provided, was held similarly restricted.<sup>18</sup>] An act which empowered the directors of an incorporated company to make contracts and bargains with workmen, agents and undertakers, would be construed as conferring on them authority to bind the company without consulting their shareholders, by such transactions; but not as so altering the general law as to dispense with those formalities by which alone a cor-

<sup>17</sup> Henry v. Morgan, 2 Binn. (Pa.) 497; Keller v. Nutz, 5 Serg. & R. (Pa.) 246; Sailor v. Hertzog, 4 Whart. (Pa.) 265; Lightner v. Mooney, 10 Watts (Pa.) 86; Harper v. Bank, 7 Watts. & S. (Pa.) 209.

<sup>18</sup> Brown v. Wilcox, 15 Iowa, 414.

(*a*) 5 & 6 Vict. c. 39; Wood v. Rowcliffe, 6 Hare, 191; Baines v. Swainson, 1 B. & S. 831; Coles v.

N. W. Bank, L. R. 10 C. P. 354, 372. See further limitations of the meaning of the same enactment, in Fuentes v. Montes, L. R. 3 C. P. 263, 4 C. P. 93; Johnson v. Credit Lyonnais, 47 L. J. Q. B. 241; 3 C. P. D. 32 (before 40 & 41 Vict. c. 39.)

<sup>18</sup> Cleaver v. Sheetz, 70 Pa. St. 496.

poration can bind itself to contracts, that is, by writing under the corporate seal (*a*).

The provision in the Friendly Societies Act, which requires a reference to arbitration of "every matter in dispute" between a society and any of its members would, on the same principle, be confined to disputes with members as members; and a breach of covenant by a member to repay a sum borrowed from his society was therefore held not to fall within the arbitration clause, as the dispute would be with the member as debtor, not as member (*b*). [Conversely, the law organizing the board of Florida Commissioners, to investigate the claims of citizens against the Spanish government, was held not to authorize them to investigate the rights of claimants as among themselves; so that, where one of several entitled to indemnity obtained an award in his favor, he was treated as a trustee for those interested." And similarly, the Orphans' Court, in Pennsylvania, though charged with making distribution of decedent's estates to the persons entitled thereto, has no jurisdiction of a claim by an administrator in his own right against the distributees;<sup>20</sup> nor vice versa;<sup>21</sup> nor to determine who is entitled to the benefit of a judgment against an intestate.<sup>22</sup>]

On similar grounds a conveyance of property, knowingly (*c*) made solely for the purpose of giving a vote contrary to the 7 & 8 W. 3, c. 25, s. 7, which declares such conveyances "void and of none effect," is void so far as to prevent the right of voting being acquired, which is the whole aim of the Act; but it is in other respects valid between the parties, so as to pass the property (*d*). [And a statute annulling grants of land at the time held adversely by another, and one making their acceptance a misdemeanor, do not affect the

(*a*) *London Waterworks Co. v. Bailey*, 4 Bing. 283.

(*b*) 10 Geo. 4, c. 56, s. 27; *Morrison v. Grover*, 4 Ex. 430. See also *Prentice v. London*, L. R. 10 C. P. 679; *Fleming v. Self*, 3 De G., M. G. 997; *Mulkern v. Lord*, 4 App. 182, 43 L. J. Ch. 745. *Comp. Wright v. Monarch Invest. Soc.*, 5 Ch. D. 726, and *Hack v. London Provid. Building Soc.*, 23 Ch. D. 103.

<sup>19</sup> *Delafield v. Colden*, 1 Paige, (N. Y.) 139.

<sup>20</sup> *Carter's App.*, 10 Pa. St. 144.

<sup>21</sup> *Flintham v. Forsythe*, 9 Serg. & R. (Pa.) 133.

<sup>22</sup> *Byrne v. Walker*, 7 Id. 483.

(*c*) *Marshall v. Bown*, 7 M. & Gr. 188; *Hoyland v. Brenmer*, 2 C. B. 84.

(*d*) *Philpotts v. Philpotts*, 10 C. B. 85.

entire instrument containing the grant of such land, but only those portions thereof as are in violation of the statutes."<sup>23</sup>

§ 119. In the 24 & 25 Vict. c. 96, which consolidates the law relating to larceny and analogous offences, the provision which imposes a penalty for "unlawfully and wilfully" killing a pigeon under circumstances not amounting to larceny, was construed as not applying to a man who had intentionally and without legal justification shot his neighbor's pigeons which were in the habit of feeding upon his land; his object being to prevent a recurrence of the trespass. His act was "unlawful," in the sense that it was actionable; and it was undoubtedly "wilful" also; but as the object and scope of the Act were to punish crimes and not mere civil injuries, the word "unlawfully" was construed as "against the criminal law" (a). [So, one who removes a seal from property which has been sealed up by officers of the customs, in ignorance of its character, and in the honest execution of a supposed duty in the care and transportation of the property, is not liable to punishment under a statute prohibiting "wilfully" removing an official seal."<sup>24</sup>] An Act which visited with fine and dismissal a road surveyor who demanded or wilfully received higher fees than those allowed by the Act, would not affect a surveyor who, under an honest mistake of fact, demanded a fee to which he was not entitled (b). [Similarly, a statute annulling any "wilfully false claim" would not affect the case of a mere discrepancy in the amount of the claim as filed of such a description as may be consistent with good faith."<sup>25</sup> Nor would a contract made usurious by a mere mistake in the calculation, and not by any wrongful intent, be void under a statute

<sup>23</sup> Towle v. Smith, 2 Robt. (N. Y.) 489. And see ante, § 98, Jackson v. Collins, 3 Cow. (N. Y.) 85.

(a) Taylor v. Newman, 4 B. & S. 89, 32 L. J. M. C. 186. See also Kenyon v. Hart, 6 Best & S. 249, 34 L. J. M. C. 87; Daniel v. Janes, 2 C. P. D. 351; Spicer v. Barnard, 1 E. & E. 874, 28 L. J. 176. [As to the meaning of "wilfully," see State v. Preston, 34 Wis. 675; Smith v. Wilcox, 47 Vt. 537 (in relation to acts committed in a

state of intoxication). An act may, however, be "wrongful," although committed entirely by mistake: Webber v. Quaw, 46 Wis. 118. See "Knowingly and wilfully," post, § 136, U. S. v. McKim, 3 Pitts. Rep. 155.]

<sup>24</sup> U. S. v. R. R. Cars, 1 Abb. U. S. 196. See post, § 129.

(b) R. v. Badger, 6 E. & B. 13, 25 L. J. M. C. 8.

<sup>25</sup> Barber v. Reynolds, 44 Cal. 519, 533.

avoiding usurious contracts.<sup>26</sup> Conversely, an act of the Legislature of Missouri, of March 17, 1868, approving the sale and confirming the title of the Iron Mountain Railroad Company in the purchaser, did not prevent the State from prosecuting claims against the parties who had committed frauds against the state in relation to the railroad.<sup>27</sup>] An Act which empowered inspectors to inspect the scales, weights and measures of persons offering goods for sale, and of seizing any found "light and unjust," was construed as limited to cases where the injustice was prejudicial to the buyer, but as not applying to a balance which gave seventeen ounces to the pound, that is, which was unjust against the seller; since the object and scope of the Act were limited to the protection of the former (a).

§ 120. An Act which, after appointing trustees to pull down and rebuild a parish church, authorized them to allot the pews and to sell the fee simple of such of them as were not appropriated by the Act, to the inhabitants of the parish, with power to the owners to dispose of them, was held not to authorize a conveyance of the soil and freehold of the land on which the pews stood, but only the easement, or right to sit in the pew during divine service (b). And where a church was built, under a similar Act, by subscribers in whom the freehold was vested, and the trustees had power to sell the pews; and a subsequent Act, reciting that doubts had arisen as to the estate and interest which the subscribers and proprietors had in the pews, enacted that the fee simple should be vested in them, it was held that it was not the freehold interest in the soil that was vested in them, but a special interest created by Parliament in the easement (c). So, the Public Health Act of 1875, which enacted that the streets should vest in the local authority was construed as intending, not that the soil and freehold should

<sup>26</sup> Sutton v. Fletcher, 6 Blackf. (Ind.) 362. And see Mortimer v. Pritchard, 1 Bailey Eq. (S. C.) 505.

<sup>27</sup> State v. McKay, 43 Mo. 594.

(a) Brooke v. Shadgate, L. R. 8 Q. B. 352. See Edwards v. Dick,

4 B. & A. 212; East Gloucestershire R. Co. v. Bartholomew, L. R. 3 Ex. 15.

(b) Hinde v. Chorlton, L. R. 2 C. P. 104.

(c) Brumfitt v. Roberts, L. R. 5 C. P. 224.

vest, but only the surface of the soil, and as much of it in depth as was necessary for doing all that was reasonably and usually done in streets (a), and for so long only as it continued to be a street (b). [Similarly, where an act authorized the Orphans' Court to appoint trustees of the estates of absentees, *durante absentia*, it was held that such appointment imported only the absence of the person for whom the trustee was desired, and did not adjudicate the ownership of any property made the subject of the trust, or that the absentee is either dead or alive.<sup>28</sup> An act providing that "every will shall be construed, with reference to the real and personal estate comprised in it, to speak and take effect as if it had been executed immediately before the death of the testator, unless a contrary intention shall appear by the will," affects only the property devised or bequeathed, and does not create a disposing power in the testator just before his death which he did not possess when he executed the will: "if he was clearly incompetent to make a will when he executed one, the fact that just before his death he became entirely competent to execute one, but did not," does not validate the will.<sup>29</sup> An act exempting a homestead to a debtor decides nothing as to his title.<sup>30</sup>]

The Metropolitan Building Act of 1855, which gives a right to raise any party structure authorized by the Act, on condition of "making good all damage" occasioned thereby to the adjoining premises, was held not to authorize the raising of a structure which obstructed the ancient lights of the adjoining premises; for the only damage contemplated by the Act was structural, and not that which resulted from the invasion of a right. And, having regard to the scope of the enactment, the expression "making good" was understood to mean that the adjoining premises were to be

(a) *Coverdale v. Charlton*, 4 Q. B. D. 104, 48 L. J. 128.

(b) *Rolls v. St. George, Southwark*, 14 Ch. D. 785.

<sup>28</sup> *Esterly's App.*, 109 Pa. St. 222, upon the act 11 Apr. 1879, P. L. 21.

<sup>29</sup> *Neale's App.*, 104 Pa. St. 214. Hence a will undertaking to create

a separate estate in favor of a daughter then 10 years of age and not in immediate contemplation of marriage, is not rendered effectual by the fact that 8 years thereafter, and before the testator's death, the girl married: *Ibid.*

<sup>30</sup> *Re Swearingen*, 5 Sawyer, 52; *Spencer v. Geissman*, 37 Cal. 96.



restored to their original state, not that pecuniary compensation should be made (*a*).

§ 121. Some decisions on the construction of the 74th section of the Harbors Act of 1847, illustrate the principle under consideration. That section enacts that the owner of a vessel is to be answerable for any damage done by it, or by any person employed in it, to a harbor, pier or dock, except when the vessel is in charge of a compulsorily taken pilot. Construed literally, as it was by the Queen's Bench (*b*), it made an owner responsible for the injury done by his ship to a pier, after she had been driven aground and necessarily abandoned by her crew, and was dashed by the storm against the pier. The Court of Exchequer Chamber thought that the enactment was to be construed as tacitly excepting damage done by the act of God and the Queen's enemies, for which by the general law of the land, a ship owner is not responsible (*c*). The House of Lords held that the owner was not liable, on the ground that the general scope and object of the Act were merely to collect the clauses which Parliament usually inserted in local harbor bills, and to give facilities of procedure to the undertakers of such works; and that the section did not create a new liability, but only facilitated proceedings against the registered owner when damages were recoverable (*d*).

The Act 16 & 17 Vict. c. 96, for regulating the care and treatment of lunatics, furnishes a remarkable illustration of the principle under consideration. Its provision that any superintendent, officer, nurse or servant of any registered hospital or licensed house, "or any person having the care or charge of any single patient," who ill-treated a patient, was held not to apply to a husband who ill-treats his lunatic wife; for it was not within the scope of the Act to deal with cases where the custody of the lunatic was owing to domestic relationship; and the woman was in her husband's custody, not because she was mad, but because she was his

(*a*) *Crofts v. Haldane*, L. R. 2 Q. B. 194. [See for construction of the phrase "make good all losses to depositors:" *Queenan v. Palmer*, 117 Ill. 619.]

(*b*) 10 Vict. c. 27; *Dennis v. Tovell*, L. R. 8 Q. B. 10.

(*c*) *Wear Commissioners v. Adamson*, L. R. 1 Q. B. D. 546.

(*d*) *Id.* 2 App. 743.

wife (a). But the Act would apply to a man who ill-treated his lunatic brother in his charge, for he has no legal custody of him by virtue of his relationship (b).

§ 122. [As further instructive illustrations of this principle of construction the following instances may be cited. Where a statute provided that the original jurisdiction of the Circuit Court of the Southern District of New York should be confined to causes arising within said district, and should not extend to causes arising within the Northern District,—the object of the provision clearly being to apportion jurisdiction and business as between the two districts only,—it was held, that, from the jurisdiction of the Southern District Circuit Court only such causes were to be deemed excluded by the act, as arose in the Northern District, not, however, such as arose outside of both districts.” Similarly, a statute, providing that a person should not be sued before any justice of the peace except in the township in which he resided, having for its immediate object to prevent justices at the county seat from monopolizing the business in the county, was held not to apply to the case of a resident of another county or state coming into a town and there served with process.” So, where the object of an act was merely the disposal of certain property of a city, and, in the description of the same in the statute, a certain street was referred to as a boundary of the entire one side of the same, whilst in fact, it extended along only part of it, such reference was held ineffectual to extend the street itself in length.” And an act extending the bounds of a town over adjacent navigable waters, the extension being merely for the purpose of civil and criminal jurisdiction, was held not to operate as a grant to the town of the land covered by the waters.” An act conferring equity jurisdiction in “all cases of trust arising

(a) *R. v. Rundle*, Dears. 482, 24 L. J. M. C. 129.

(b) *R. v. Porter, Leigh & C.* 394, 33 L. J. M. C. 126.

<sup>31</sup> *Wheeler v. McCormick*, 8 Blatchf. 267. This interpretation seems also justifiable on the grounds (1) of an intention appearing from the context that the general words

should be understood in a particular sense; and (2) of the presumption against an intention to narrow the jurisdiction of a court: see post, §§ 151 et seq.

<sup>32</sup> *Maxwell v. Collins*, 8 Ind. 38.

<sup>33</sup> *People v. Dana*, 22 Cal. 11.

<sup>34</sup> *Palmer v. Hicks*, 6 Johns. (N. Y.) 133.

under deeds, wills, or in the settlement of estates" was held to apply only to express trusts arising from the written contract of the decedent, not to such as are implied by law or grow out of the official situation of an executor or administrator.<sup>35</sup> Another, relating to uses and trusts, was similarly confined to real estate;<sup>36</sup> and the provision of the judiciary act declaring the laws of the several states the rule of decision in federal courts in certain cases, was held inapplicable in the construction of ordinary contracts and questions of general commercial law.<sup>37</sup> So, an act causing forfeiture of a life estate leaves unaffected the estate in remainder,<sup>38</sup> and one making long terms of years real estate for certain purposes has no effect upon the reversions expectant upon those terms.<sup>39</sup> Similarly, a private act directing the sale of a person's property by the Surveyor-General without warranty, and the application of the money in payment of certain creditors, operates only as a quit claim of any right or interest of the State in the property and does not take away the rights of third persons.<sup>40</sup> An act legalizing the action of certain townships as to paying bounties, etc., does not extend to refunding advances made by individuals on their own account and not on the credit of the townships, or in reliance upon their subsequent ratification.<sup>41</sup> An act permitting a turnpike road company to abandon a portion of its road, does not discharge its directors from a penalty incurred in reference to such portion of the road previously to the act authorizing its abandonment.<sup>42</sup> A provision that the transfer of a public contract shall cause its annulment, does not apply to a preliminary arrangement for the purpose merely of uniting capital to obtain the means of fulfilling the contract, in the absence of any corrupt intention to influence the bidding or evade the duties and responsibilities of a public contractor.<sup>43</sup> Nor does an act "regulating criminal pro-

<sup>35</sup> *Given v. Simpson*, 5 Me. 303.

<sup>36</sup> *Baker v. Terrell*, 8 Minn. 198.

<sup>37</sup> *Swift v. Tyson*, 16 Pet. 1.

<sup>38</sup> *Archer v. Jones*, 26 Miss. 583.

<sup>39</sup> *Burnett v. Thompson*, 7 Jones L. (N. C.) 407.

<sup>40</sup> *Jackson v. Catlin*, 2 Johns. (N. Y.) 248.

<sup>41</sup> *People v. Supervisors*, 14 Mich. 336. *Comp. Weister v. Hade*, 52 Pa. St. 474, ante, § 79.

<sup>42</sup> *Kane v. People*, 8 Wend. (N. Y.) 203.

<sup>43</sup> *Field v. U. S.*, 16 Ct. of Cl. 434.

ceedings" extend to collateral issues;<sup>44</sup> nor a statute requiring a contractor for work for the state to give bond with sureties to pay all laborers employed by him on the work included in his contract, to laborers employed by a subcontractor.<sup>45</sup> So, it was held that the act 2 March, 1867, relating to removal of suits from state to U. S. Circuit courts, had no application to a controversy between a citizen of the state in which suit is brought and an alien.<sup>46</sup> An act annulling "all agreements to pay attorney fees, depending on any condition," made part of any bill, note, etc., forbids only conditional agreements, not absolute or unqualified ones;<sup>47</sup> and by reference to its purpose, an act may be shown to be designed to have a retrospective or curative operation only, and to be without prospective force.<sup>48</sup>

§ 123. [So, where an act declaring the property of married women to be theirs and empowering them to use and enjoy the same, as if sole, was construed to have been intended merely for the protection of the wife's property against the husband's interference and his creditors, it was held to be beyond its scope to give her an absolute right to dispose of her estate without the husband's consent, or in any other way to alter the legal incidents of the marriage relation.<sup>49</sup> Nor would a provision, that on a judgment recovered against husband and wife for the tort of the latter, execution shall first issue against the property of the wife, give any exemption to the husband from liability for his wife's torts, beyond this primary liability of her estate.<sup>50</sup> Nor can a provision making the wife liable for her own torts have the effect of removing the husband's liability for acts of the wife done under circumstances amounting to coercion on his part, which, therefore, the law regards, as the torts of the husband.<sup>51</sup> And it has been held that an en-

<sup>44</sup> *People v. Youngs*, 1 Cal. (N. Y.) 37.

<sup>45</sup> *McCluskey v. Cromwell*, 11 N. Y. 593.

<sup>46</sup> *Stinson v. R. R. Co.*, 20 Minn. 492.

<sup>47</sup> *Churchman v. Martin*, 54 Ind. 380.

<sup>48</sup> See *Marsh v. Nelson*, 101 Pa. St. 51; *Lucas v. State*, 86 Ind. 180.

<sup>49</sup> *Pettit v. Fretz*, 33 Pa. St. 118.

<sup>50</sup> *Quick v. Miller*, 103 Pa. St. 67.

<sup>51</sup> See *Longey v. Leach*, 57 Vt. 377; *Doherty v. Madgett* (Vt.) 2 Atl. Rep. 115; *Weber v. Weber*, 47 Mich. 569. See *Atty. Gen. v. Riddle*, 2 Cr. & Jer. 493; *Taylor v. Greene*, 8 Car. & P. 316; 34 E. C. L. R. 754.

actment declaring that a married woman may be sued for her torts, without joinder of her husband, and in all respects as if sole, does not take away her common law immunity from arrest on *capias ad respondendum*.<sup>52</sup> Nor does a statutory provision rendering a married woman capable of suing, in all respects as if she were a *feme sole*, without joinder of her husband, abrogate the rule that a married woman cannot act as guardian ad litem, next friend, etc.; the provision being designed to let her sue only for her own benefit.<sup>53</sup> An act prescribing the manner in which husband and wife may "dispose of and convey the estate of the wife or her right of, in, or to any lands, tenements, or hereditaments whatsoever," was held to enable a married woman to convey or incumber only her existing interest in realty held in possession, remainder or reversion, and not to make, *e. g.*, a valid mortgage of an estate resting in mere possibility, which could be effectual, at best, only as a contract to convey and as in the nature of a covenant to stand seized.<sup>54</sup> Nor does an act giving to the wife, as her separate property, with or without the right of suit, the earnings of her labor, change the law so as to give her a claim for work done by her for her husband, or in his business.<sup>55</sup>

§ 124. [An act intended to remove the incompetency of parties to suits and other legal proceedings, on the score of interest, to testify therein, cannot have the effect of rendering incompetent one, who before the act, was a competent witness.<sup>56</sup> Nor will an act declaring that all former deeds shall have a certain effect, if certain requisites are observed, prevent their being used as evidence in the same manner

<sup>52</sup> *Whalen v. Gabel*, 44 Leg. Int. (Pa.) 430. Compare, however, *Muser v. Miller*, 12 Abb. N. Cas. (N. Y.) 305; 65 How. Pr. 283. See also, as to attachment, *Frank v. Siegel*, 9 Mo. App. 467. See *Add'a.*

<sup>53</sup> *In re Duke of Somerset*, *Thynne v. St. Maur*, L. R. 34 Ch. D. 465.

<sup>54</sup> *Dorris v. Erwin*, 101 Pa. St. 239. But see *Bond v. Bunting*, 78 Id. 210. And compare, as to the broader phrase "property," *Knight v. Thayer*, 125 Mass. 25. But see, as to "property which

she may thereafter acquire;" *Re Insole*, L. R. 1 Eq. 470; *Whittingham's Trust*, 12 W. R. 775; *Deakin v. Lakin*, L. R. 30 Ch. D. 169.

<sup>55</sup> See *Reynolds v. Robinson*, 64 N. Y. 589; *Beall v. Kiah*, 4 Hun (N. Y.) 171; *Cunningham v. Canney*, 12 Ill. App. 437; *Triplett v. Graham*, 58 Iowa, 135; *Morgan v. Bolles*, 36 Conn. 175.

<sup>56</sup> *Sheetz v. Hanbest*, 81 Pa. St. 100; *Packer v. Noble*, 103 Pa. St. 188.

in which they might before have been used." So a provision intended to confer larger powers on married women, but prohibiting a married woman from becoming surety, etc., for another, will not debar her from mortgaging her real estate for the debts of her husband, that being a power she had before, and the transaction not necessarily, or even properly, being included under the term suretyship." Similarly, an act prohibiting preferences in assignments by debtors, in trust for benefit of creditors and requiring the assignment to stand for the benefit of all the creditors, does not impliedly prohibit all compositions with creditors, the law, before that act, recognizing compositions with, as well as an assignment for creditors," nor, indeed, does it annul a preference in any other mode than by such an assignment."

§ 125. [An act authorizing a writ of error to be sued out by any person aggrieved "by the judgment of any court of common pleas upon any writ of quo warranto," etc., does not change the rule of law that the allowance of the writ, in the first instance, is discretionary, and hence the action of the court upon a rule to show cause why the writ should not issue is not the subject of a writ of error." So, an act giving an appeal from the refusal of the court to open judgments entered on warrants of attorney, does not change the rule that the exercise of such jurisdiction lies within the sound discretion of the Court, and all the reviewing court has to determine is, whether the discretion was properly exercised below." Moreover, where a judgment has been revived, the act will apply in those cases in which the revival was amicable;" but not in those in which the revival was by adversary proceeding:" the former case being within the obvious purpose of the statute, *i. e.*, to give the defendant a day in court; and the latter being as obviously beyond its scope; for the defendant has had his day." And so, where

<sup>57</sup> Jackson v. Bradt, 2 Cal. (N. Y.) 169.

<sup>58</sup> See Butterfield v. Okie, 36 N. J. Eq. 482; Baldwin v. Flagg, Id. 48; Bartlett v. Bartlett, 4 Allen (Mass.) 440; Heburn v. Warner, 112 Mass. 271.

<sup>59</sup> Wiener v. Davis, 18 Pa. St. 331.

<sup>60</sup> York Co. B'k v. Carter, 38 Pa. St. 446.

<sup>61</sup> Com'th v. Davis, 109 Pa. St. 128.

<sup>62</sup> Earley's App., 90 Pa. St. 321.

<sup>63</sup> Lamb's App., 89 Pa. St. 407.

<sup>64</sup> First Nat. Bank's App., 106 Pa. St. 68.

<sup>65</sup> See *Ib.* p. 71

an act provided, that, upon the trial of all cases, exclusively triable in the court of Oyer and Terminer, "exceptions to *any* decision of the court may be made by the defendant, and a bill thereof shall be sealed in the same manner as is provided and practised in civil cases; and the accused, after conviction and sentence, may remove the indictment, record, and *all proceedings* to the Supreme Court," it was held that the act did not authorize exception or writ of error to a matter, which, in civil cases, was recognized as one of discretion with the trial court; *e. g.*, to the refusal of a new trial or a continuance, attachment of witnesses, and the like, or the granting of a continuance on motion of the commonwealth.<sup>66</sup>

§ 126. [Again, a statute will not be construed as permitting an act, *e. g.*, gaming, which is prohibited by previous statutes, if such construction can be fairly avoided.<sup>67</sup> An act rendering parties in interest competent to testify on their own behalf will not affect the established rule that an indorser of a negotiable instrument shall not be a witness to invalidate the instrument to which he is a party.<sup>68</sup> The immediate object of the Pennsylvania interpleader act of 1848 being the protection of sheriffs, etc., it does not relieve the plaintiff in an execution, who directs the seizure of property of a person not a party against whom the process is issued from liability in trespass, unless, under the sheriff's rule, the owner voluntarily becomes a party to the adjudication of his claim.<sup>69</sup> So, an act giving the Court of Quarter Sessions jurisdiction to lay out public streets within the limits of boroughs in the county, and providing that "damages to the owner of land injured thereby shall be *assessed* as provided under the general road laws," does not make the same *payable* under those laws, by the county, but leaves that liability upon the boroughs under the general borough law.<sup>70</sup> So an act providing for a method of assessing, etc., damages for injuries arising from an excavation or embankment within

<sup>66</sup> *Alexander v. Com'th*, 105 Pa. St. 1.

<sup>67</sup> *Aicardi v. Alabama*, 19 Wall. 635.

<sup>68</sup> *John's Adm'r v. Pardee*, 109 Pa. St. 545.

<sup>69</sup> *Larzelere v. Haubert*, 109 Pa. St. 515.

<sup>70</sup> *In re Airy Str.*, 113 Pa. St. 281.

the boundaries of a public highway, will not, it is said, be extended beyond the purpose it expresses, *e. g.*, to the case of a railroad laying an additional track in front of plaintiff's lands, obstructing the approach to the same.<sup>71</sup> An act giving an adopted child the right to inherit was held not intended to change, in any respect, the law relating to collateral inheritance taxes, from which only lineal descendants were exempted.<sup>72</sup> Nor does an act authorizing attachment of wages for boarding debts deprive the debtor of the benefit of the exemption laws, but can apply only where the benefit of these laws is not claimed in proper time or form, or where the wages exceed the amount exempted.<sup>73</sup> Again, an act "to provide for the admission of certain classes of the insane into hospitals," etc., was held not to supply, modify or repeal any of the provisions of an earlier act respecting the issuing of a commission de lunatico inquirendo, and the disposition and control of the estates of lunatics; so that the summary inquiry under the later act did not dispense with or prevent the inquisition under the earlier act, as related to the appointment of a committee, the sale of real estate, etc.<sup>74</sup> Nor does an act imposing a penalty for cutting timber extend to the case of a co-tenant;<sup>75</sup> or a statute limiting the time for recovery of fines and forfeitures to cases of murder or other felony.<sup>76</sup>

§ 127. **Change of Common Law.**—[It is observable from the decisions referred to in the preceding sections, that the presumption against an intent to alter the existing law beyond the immediate scope and object of the enactment under construction, applies as well where the existing law is statutory, as where it is promulgated by decisions.<sup>77</sup> It refers to the whole system of pleading and practice to which the statute applies and of which its rule is to form a part: the latter

<sup>71</sup> Cumberland, etc., R. R. Co. v. Rhoadarmer, 107 Pa. St. 214. And see Newcastle, etc., R. R. Co. v. McChesney, 85 Id. 526.

<sup>72</sup> Com'th v. Nancrede, 32 Pa. St. 389.

<sup>73</sup> Smith v. McGinty, 101 Pa. St. 402.

<sup>74</sup> Halderman's App., 104 Pa. St. 251.

<sup>75</sup> Wheeler v. Carpenter, 107 Pa. St. 271.

<sup>76</sup> State v. Taylor, 2 McCord (S. C.) 483.

<sup>77</sup> See Sedgw. p. 224, note; for the judicial decisions upon the statutes, as has been seen, ante, § 1, note 1, form a part of the statute law.



must be construed consistently with the former." And it refers equally to the common law, in whose rules and principles a statute is not presumed to make any change beyond what is expressed in its provisions, or fairly implied in them, in order to give them full operation." It has been said that acts of congress are to be construed by the rules of the common law ;<sup>78</sup> that statutes are to be interpreted in the light of the common law,<sup>79</sup> with reference to the principles of the common law in force at the time of their passage ;<sup>80</sup> that technical legal terms are to be taken, as a general rule, and in the absence of a countervailing intent, in their established common law significance ;<sup>81</sup> and that statutes in affirmance of the common law should be construed, as to their consequences, in accordance with the common law.<sup>82</sup> In all these cases and many others, the principle is recognized that an intent to alter the common law beyond the evident purpose of the act is not to be presumed. It has, indeed, been expressly laid down, that "statutes are not presumed to make any alteration in the common law further, or otherwise, than the act does expressly declare ; therefore, in all general matters, the law presumes the act did not intend to make any alteration ; for, if the Parliament had that design, they would have expressed it in the act ;"<sup>83</sup> that "the rules of the common law are not to be changed by doubtful implication."<sup>84</sup> And it is probably true, that, taking one case with another, "an intention on the part of the Legislature to

<sup>78</sup> *McDonnegal v. Dougherty*, 14 Ga. 674.

<sup>79</sup> *Scaife v. Stovall*, 67 Ala. 237.

<sup>80</sup> *Rice v. R. R. Co.*, 1 Black. 358. The legislature is presumed to know the common law ; *Jones v. Dexter*, 8 Fla. 276, 286.

<sup>81</sup> *Scaife v. Stovall*, *supra*.

<sup>82</sup> *Howe v. Peckham*, 6 How. Pr. (N. Y.) 229.

<sup>83</sup> *Apple v. Apple*, 1 Head (Tenn.) 348 ; and see *ante*, § 3.

<sup>84</sup> *Baker v. Baker*, 13 Cal. 87.

<sup>85</sup> *Arthur v. Bokenham*, 11 Mod. 150. And see, to substantially same effect, *Heiskell v. Baltimore*, 65 Md. 207.

<sup>86</sup> *Wilbur v. Crane*, 13 Pick. (Mass.) 284, 290. And see *Bennett v. Hollman*, 44 Miss. 323 ; *Sullivan*

*v. La Crosse, etc., Co.*, 10 Minn. 386 ; *Blackman v. Wheaton*, 13 Id. 326. Thus the common law principle, that dispenses with notice of cause of arrest where a person is taken in the commission of an offence, or upon fresh pursuit thereafter, is held not changed by the word "escape" in § 5038 of the Code of Tennessee, providing an exception to the requirement of notice of cause of arrest where the person is taken in the actual commission of the offence, "or is pursued immediately after the *escape*," that word being used, not in its technical sense, but as equivalent to "flee from:" *Lewis v. State*, 3 Head (Tenn.) 127.

alter the statute law is sometimes presumed upon much slighter grounds than would support any such inference in the case of the common law."<sup>87</sup> But in this country, the rule has assumed the form of a dogma, that all statutes in derogation of the common law, or out of the course of the common law, are to be strictly construed.<sup>88</sup> Undoubtedly, wherever the construction of an act falls under and is affected by the operation of the presumption against a change of the existing law beyond its immediate objects and purposes, the result is a certain strictness of construction.<sup>89</sup> But the "strict construction" referred to in the formula stated goes beyond this, and requires, as in the interpretation of penal laws,<sup>90</sup> that a case, in order to be within the meaning of a statute in derogation of the common law, must be as well within its letter as within its spirit.<sup>91</sup> There are, indeed, decisions scattered through the reports in which this doctrine has not been followed, or possibly which establish, at least within their respective states, recognized exceptions to it. Thus it has been said, that, where a statute is intended to be a substitute for the common law rule, and not merely cumulative, it is to be liberally construed in accordance with that intention;<sup>92</sup> and in Iowa it was held that the code

<sup>87</sup> Wilb., Stat. L. p. 21.

<sup>88</sup> See *Brown v. Barry*, 3 Dall. 365; *Shaw v. R. R. Co.*, 101 U. S. 557; *Burnside v. Whitney*, 21 N. Y. 148; *Newell v. Wheeler*, 48 Id. 486; *Smith v. Moffat*, 1 Barb. (N. Y.) 65; *Graham v. Van Wyck*, 14 Id. 531; *Perkins v. Perkins*, 62 Id. 531; *Bussing v. Bushnell*, 6 Hill (N. Y.) 382; *Rue v. Alter*, 5 Denio (N. Y.) 119; *Millard v. R. R. Co.*, 9 How. Pr. (N. Y.) 238; *Melody v. Reab*, 4 Mass. 471; *Gibson v. Jenny*, 15 Id. 205; *Com'th v. Knapp*, 9 Pick. (Mass.) 496; *Wilbur v. Crane*, 13 Id. 284; *Lord v. Parker*, 3 Allen (Mass.) 127; *Schuyler Co. v. Mercer*, 9 Ill. 20; *Lock v. Miller*, 3 Stew. & P. (Ala.) 13; *Gunter v. Leckey*, 30 Ala. 591; *Hollman v. Bennett*, 44 Miss. 323; *State v. Norton*, 23 N. J. L. 33; *Esterley's App.*, 54 Pa. St. 192; *Mullin v. McCreary*, Id. 230; *Hotaling v. Cronise*, 2 Cal. 60;

*Sibley v. Smith*, 2 Mich. 486; *State v. Whetstone*, 13 La. An. 376; *Crowell v. Van Bebber*, 18 Id. 637; *Develly v. Develly*, 46 Me. 377; *Sullivan v. La Crosse, etc., Co.*, 10 Minn. 386; *Warner v. Fowler*, 8 Md. 25; *Thistle v. Coal Co.*, 10 Id. 129; *Stewart v. Stringer*, 41 Mo. 400; *Howey v. Miller*, 67 N. C. 459; *Bailey v. Bryan*, 3 Jones L. (N. C.) 357; *Young v. McKenzie*, 3 Ga. 31; *Hearn v. Ewin*, 3 Cold. (Tenn.) 399.

<sup>89</sup> See 1 Kent, Comm. 464, and *Bish. Wr. L.* § 155, where it is said that "statutes in derogation of the common law, or of a prior statute, are construed strictly."

<sup>90</sup> See post, § 329.

<sup>91</sup> See *Dewey v. Goodenough*, 56 Barb. (N. Y.) 54.

<sup>92</sup> *Hannon v. Madden*, 10 Bush. (Ky.) 664.

was intended to furnish a system of practice and compact law, and, when in derogation of the common law, it was to be liberally construed to carry out the object of that system." And so in some instances in which the statutes under construction were held remedial, *e. g.*, statutes giving mechanics' liens;<sup>94</sup> statutes altering the legal status of married women;<sup>95</sup> and in the case of a statute limiting the liability of ship-owners in respect of any "goods or merchandise whatever," where that phrase was construed as including baggage.<sup>96</sup> But in general, the formula of the rule, at least, in the sense indicated, has been adhered to, if its application has been somewhat relaxed. It is perhaps significant that in England, from whence this rule is professed to be derived,<sup>97</sup> it was said in a recent case, that the fact that a statute interferes with a man's common law rights is no reason why it should be construed differently from any other act of Parliament.<sup>98</sup> The "enthusiastic loyalty to a body of law, the most peculiar features of which the activity of the present generation has been largely occupied in uprooting and destroying,"<sup>99</sup> would appear to have its principal professors in that portion of the world in which it is most out of place. It is submitted, that, as a rule of construction, in the sense above indicated, the formula referred to has no justification as applied to the existing common law, any more than as applied to the existing statute law. In nearly every instance in which it has been invoked to control the result with proper effect, the same end would have been reached by a little diligent search for, and discriminating application of, other rules of construction which will hereafter appear, and under which those cases will be

<sup>93</sup> *Kramer v. Rebman*, 9 Iowa, 114.

<sup>94</sup> *Buchanan v. Smith*, 43 Miss. 90; *Chapin v. Persse, etc.*, Works, 30 Conn. 461; *Oster v. Rabeneau*, 46 Mo. 595.

<sup>95</sup> *Corn Exch. v. Babcock*, 42 N. Y. 613; *De Vries v. Conklin*, 22 Mich. 255.

<sup>96</sup> *Chamberlain v. West. Transp. Co.*, 44 N. Y. 305. But see *U. S. v. Davis*, 5 Mason, 356, that choses in action, like bonds, bills, etc.,

are not included in "personal goods," in a penal act.

<sup>97</sup> See Sedgw. p. 273.

<sup>98</sup> *The Warkworth, L. R. 9 P. Div. 21*, affirmed in Court of Appeals. It is also noticeable that Judge Maxwell's learned work refers in no place to the doctrine that statutes in derogation of the common law are to be strictly construed, as a rule of construction.

<sup>99</sup> Sedgw. p. 273.

cited ; and in the remainder of the cases, signally those construing by the above formula statutes enfranchising married women, the result has been wrong, and has had to be set right by subsequent legislation. But, in so far as it recognizes the presumption against an intention to change the existing law, and to that extent only, the rule is accurate.

[It is said by an eminent author: "With all the gross imperfection of the common law, it did contain certain grand principles, and these principles had been worked out into many practical rules both of primary rights and of procedure, which protected personal rights, rights of property, of life, of liberty, of body and limb, against the encroachments both of government and of private individuals. This was the great glory of the common law. Any statutes which should take away, change or diminish these rights should be strictly construed. To this extent the rule is in the highest degree valuable, not because such statutes 'are in derogation of the common law,' but because they oppose the overwhelming power of the government to the feeble power of resistance of the individual, and it is the duty of courts, under such circumstances, to guard the individual as far as is just and legal, or, in other words, to preserve the individual from having his personal rights taken away by any means that are not strictly legal."<sup>100</sup> All the matters here enumerated are covered by the rules forbidding, except in clear cases (and in such, it is conceded, even the formula "in derogation," etc., would have to give way,<sup>101</sup>) a construction which would create a new, or destroy an existing, jurisdiction or remedy, or give summary process, and the rule which requires a strict construction of statutes that restrict or encroach upon rights, impose burdens upon persons or property, or confer exemptions, privileges or powers. As to all other statutes changing, or departing from, the common law, the same rule applies as in the case of statutes changing a statutory rule, viz.: that the Legislature is not presumed to intend any alteration beyond the immediate objects and provisions of the enactment.

<sup>100</sup> Sedgw. p. 271, note, *Pomero-*

<sup>101</sup> *State v. Norton*, 23 N. J. L. 33.

§ 128. [To the class of statutes falling under this rule belong those changing the rules of evidence, or permitting persons to be witnesses in their own cases.<sup>102</sup> Thus, where an act declared that no "interest or policy of law" should exclude a party or person from being a witness in any civil proceeding, it was held that a married woman was not thereby made a competent witness to bastardize her issue.<sup>103</sup> "When we come to consider," said the court, "that the 'interest or policy of law' which the legislature had in view in passing that act, was that, which, before that time, excluded parties from testifying in their own suits, or where they had an interest in the subject matter in controversy, it becomes obvious that a case, such as the one under discussion (an appeal from the order of justices removing a pauper from one poor district to another) was not in the legislative mind when that act was passed. It would, therefore, be an unnecessary and violent construction of the statute to make it include a 'policy of law' wholly different from that under contemplation when it was framed."<sup>104</sup> Nor, as has been seen, could the act, which was an enlarging one, make any one incompetent who was competent before,<sup>105</sup> as little as the provision forbidding a woman to make a contract of suretyship, in a statute whose main purpose was to enlarge her powers over her property, could abridge her common law right to mortgage it for the debt of her husband.<sup>106</sup> On the other hand, where the purpose of a statute relating to the rights and powers of married women over their property was merely to protect the same against her husband's interference and creditors, it was held to be beyond its scope to confer upon her any power or capacity to contract which she did not possess before, or which was not expressly or by necessary inference given her in the act;<sup>107</sup> and this although the act was recognized to be an enlarging and enabling one, to be administered in the spirit of the

<sup>102</sup> See *Warner v. Fowler*, 8 Md. 25; *Thistle v. Coal Co.*, 10 Id. 129; *Hotaling v. Cronise*, 2 Ca. 60.

<sup>103</sup> *Tioga Co. v. South Creek* 1p., 75 Pa. St. 433.

<sup>104</sup> *Ibid.*, at p. 487.

<sup>105</sup> See ante, § 124.

<sup>106</sup> See *ibid.*

<sup>107</sup> *Moore v. Cornell*, 68 Pa. St. 320.

rights enlarged by it,<sup>108</sup>] And so, too, where the effect of such a statute was simply to assimilate whatever property might accrue to a married woman to an equitable estate settled to her use, it was held that it gave no legal validity to any contracts except such as, under a chancery jurisdiction, would have had equitable validity; and hence as a matter of course, that it was beyond its scope to confer upon married women who possessed no property a right to make contracts which they could not have had before.<sup>109</sup>

[Other statutes belonging to this class are such as allow a judgment debtor to pay his debt to the sheriff in discharge thereof;<sup>110</sup> changing the commercial law,<sup>111</sup> and the like.]

§ 129. **Intent as an Element of Crime.**—On this general principle of construction, [that the operation of an act, though couched in general language, is not to be extended beyond the immediate purpose it is designed to serve or accomplish, because it is not to presume that the law is designed to be changed further than is necessary therefor,] a statute which made in unqualified terms an act criminal or penal, would be understood as not applying where the act was excusable or justifiable on grounds generally recognised by law. [Where the language of the enactment indicates its applicability only in the case of an absence of excuse, there can be no difficulty

<sup>108</sup> Bergey's App., 60 Pa. St. 408, 418.

<sup>109</sup> Eckert v. Reuter, 33 N. J. L. 263; Vankirk v. Skillman, 34 Id. 109; Lewis v. Perkins, 36 Id. 133; Wilson v. Herbert, 41 Id. 454; Mather v. Brokaw, 43 Id. 587; Heywood v. Shreeve, 44 Id. 94; Morris v. Lindsley, 45 Id. 435; Bradley v. Johnson, Id. 487; 46 Id. 27; Condon v. Barr (N. J.) 5 Centr. Rep. 556. Under the English Married Women's Property Act of 1882; 45 & 46 Vict. c. 75, s. 1, sub. s. 2, permitting a married woman to bind herself by her contracts "in respect of and to the extent of her separate property" it is held that her ownership of separate property at the time of making the contract is essential to its validity as against her: Palliser v. Gurney, L. R. 19 Q. B. D. 519. And see In re Shakespear, Deakin v. Lakin,

30 Ch. D. 169. See to similar effect, under an act making a judgment obtained against a married woman recoverable only out of her separate estate, Offutt v. Dangler, (D. C.) 5 Centr. Rep. 430; and see Leinbach v. Templin, 105 Pa. St. 522; Spering v. Laughlin, 113 Id. 209. But comp. Frecking v. Rolland, 53 N. Y. 422; Ackley v. Westervelt, 86 Id. 448; Tiemeyer v. Turnquist, 85 Id. 516; Adams v. Curtis, 4 Lans. (N. Y.) 164; Speck v. Gurnee, 25 Hun (N. Y.) 644; Cashman v. Henry, 75 N. Y. 103; Cramer v. Hanaford, 53 Wis. 85; Tallman v. Jones, 13 Kan. 438, and also Zurn v. Noedel, 113 Pa. St. 336.

<sup>110</sup> Howey v. Miller, 67 N. C. 459.

<sup>111</sup> Crowell v. Van Bebber, 18 La. An. 637.

in limiting its scope and consequent operation to such instances. Thus it has been held, that, to "suffer" a ram to go at large, or out of the owner's enclosure, implies consent or willingness on the latter's part;<sup>112</sup> and that a penalty imposed for "suffering" hogs to run at large is incurred only where they are voluntarily suffered so to do, and not where they escape from the owner without his default.<sup>113</sup> But in the absence of such an indication,] a statute which imposed three months' imprisonment and the forfeiture of wages on a servant who "absented himself from his service" before his term of service was completed, would necessarily be understood as confined to cases where there was no lawful excuse for the absence (*a*). A Statute which made it felony "to break from prison," would not apply to a prisoner who broke out from the prison on fire, not to recover his liberty, but to save his life (*b*): and one which declared it piracy to "make a revolt in a ship," would not include a revolt necessary to restrain the master from unlawfully killing persons on board (*c*), even if it could be justly called a revolt. And a seaman would not be guilty of "deserting," who was driven by the cruelty of his officers to leave his ship (*d*). The sheriff who arrests under a warrant the driver of the mails, is not indictable for knowingly and willfully obstructing and retarding the mail (*e*). [And, where a statute gave treble damages against any person who should commit waste on land, pending a suit for its recovery, it was held that the act did not apply to a party wholly ignorant of the fact that a suit was pending, on the ground that the statute should be limited to the object the Legislature had in view.<sup>114</sup> Similarly, statutes giving punitive, double or treble, damages

<sup>112</sup> *Selleck v. Selleck*, 19 Conn. 501. And see *Hall v. Adams*, 1 Aik. (Vt.) 166; 2 Id. 130.

<sup>113</sup> *Com'th v. Fourteen Hogs*, 10 Serg. & R. (Pa.) 398.

(*a*) 4 Geo. 4, c. 34, s. 3; *Re Turner*, 9 Q. B. 80. See also 21 Hen. 8, c. 13, Gibs. Cod. 887. [So it was held that act 1741, ch. 35, § 22, North Carolina, does not impose a penalty where an overseer is entitled to leave by his contract, or may be turned away:

*Steed v. McRae*, 1 Dev. & B., L. (N. C.) 485.]

(*b*) 2 Inst. 590.

(*c*) 11 & 12 Wm. 3, c. 7, s. 9; *R. v. Rose*, 2 Cox, 329; *The Shepherdess*, 5 Rob. 266.

(*d*) *Edward v. Trevellick*, 4 E. & B. 59.

(*e*) *U. S. v. Kirby*, 7 Wallace, 482.

<sup>114</sup> *Reed v. Davis*, 8 Pick. (Mass.) 516. See ante, § 119; and compare, post, § 132.

against one cutting and converting to his own use timber growing on the land of another, without the latter's consent, are held confined to cases where some element of wilfulness, wantonness, carelessness, or evil design enters into the act,<sup>116</sup> and do not, therefore, include the case of a corporation entering upon the lands of another and taking timber trees under a right of eminent domain;<sup>117</sup> and this although, in consequence of the failure of the company to give bond or make compensation as required by statute, the taking of the land was a trespass.<sup>117</sup>]

§ 130. *Incapacity, etc.*—As *mens rea*, or a guilty mind, is, with few exceptions, an essential element in constituting a breach of the criminal law, a statute, however comprehensive and unqualified it be in its language, is usually understood as silently requiring that this element should be imported into it, unless a contrary intention be expressed (*a*). [It is, indeed, said, that, where the intent to do a forbidden thing is wanting, a person commits no offence in law, although he does that which is completely within all the words of a statute which prohibits it, and which is silent concerning the intent.<sup>118</sup>] A statute, for instance, which in general terms enacted that every person who committed a certain act should be adjudged a felon, would not include a child under seven, or an idiot, or a lunatic during the loss of his reason (*b*), or a man in a state of mental insensibility caused by intoxication (*c*); for it would be unreasonable to infer from the mere use of an unqualified term, an intention to repeal the general principle that such persons are not capable of a criminal intention. [In all cases in which the statute makes the intention, as well as the act, an integral part of the crime, the question of intoxication is material, in

<sup>116</sup> *Cohn v. Neeves*, 40 Wis. 393; *Kramer v. Goodlander*, 98 Pa. St. 353, 363.

<sup>116</sup> *Bethlehem, etc., Co. v. Yoder*, 112 Pa. St. 136. See also *Justice v. R. R. Co.*, 87 Id. 28.

<sup>117</sup> See cases in preceding note.

(*a*) See ex. gr. *R. v. Harvey*, L. R. 1 C. C. R. 284.

<sup>118</sup> *State v. Gardner*, 5 Nev. 377. But it is said that penal statutes not authorizing indictments are

not within this rule: *U. S. v. Thomasson*, 4 Biss. 99. A construction, however, which would make a man guilty regardless of the question of intent, is not to be preferred: *Bradley v. People*, 8 Col. 599.

(*b*) 1 Hale, 706; *Eyston v. Studd*, Plowd. 465; *Bac. Ab. Stat. I. 6*. See *Exp. Stamp, De Gex*, 345.

(*c*) *R. v. Moore*, 3 C. & K. 319.



order to test the accused's capacity to decide between right and wrong.<sup>119</sup> Thus, larceny involves a felonious intent, and if one who takes property is too drunk to have any intent, he is not guilty thereof.<sup>120</sup>]

§ 131. **Acts done in Assertion of Right.**—Again, an act done in the honest assertion of a right which would be good in law if well founded in fact, but which proves unfounded in fact, would, for the same reason, not fall within a statute which prohibited it under a penalty; unless, indeed, the penalty was in the nature simply of compensation for a civil injury (*a*). So, if a man cut down a tree or demolished a house standing on land of which he was in undisturbed possession, and believed himself to be the owner, he would not be punishable under Statutes which prohibited such acts in general terms; though it turned out that his title was bad and the property was not his (*b*). [So, an entry on the land of another, under a bona fide claim of right, *e. g.*, by an employé of a railroad company, ordered to fell trees on land conveyed to the company, adjacent to its track, was held not to be a criminal offense under the laws of North Carolina.<sup>121</sup>] If one demanded goods with threats, bona fide believing that they belonged to him, he would not be guilty of robbery, though civilly liable (*c*). [So, when a party bought cotton of a firm, which was stored in certain houses, and, in removing it, carried off cotton belonging to the firm in another house, openly, and under a claim of right, as a party of the trade, such taking was held not to be a felony.<sup>122</sup>] If one forcibly took a girl under sixteen from the custody of her guardian in the honest but mistaken belief that he was, himself, invested with that character, and acted simply in the exercise of his right as guardian, he would not be guilty of the criminal offence of abduction, though that is defined

<sup>119</sup> Wenz v. State, 1 Tex. App. 36.

<sup>120</sup> People v. Walker, 38 Mich. 156. See also, Hopt v. Hopt, 104 U. S. 631; Nevling v. Com'th, 98 Pa. St. 323; Smith v. Wilcox, 47 Vt. 537.

(*a*) See *ex. gr.* Lee v. Simpson, 3 C. B. 871.

(*b*) R. v. Burnaby, 2 Lord Raym. 900.

<sup>121</sup> State v. Crosset, 81 N. C. 579. But as to mere belief, after warning; see State v. Bryson, Id. 595.

(*c*) R. v. Hale, 3 C. & P. 409. See also and comp. R. v. Cridland, 7 E. & B. 853, 27 L. J. M. C. 287, and Morden v. Porter, 7 C. B. N. S. 641; 29 L. J. M. C. 213.

<sup>122</sup> Newton Manuf'g Co. v. White, 63 Ga. 697.

as "unlawfully taking a girl under sixteen out of the possession and against the will of the person having the lawful care of her" (a). A man who fished in a tidal river, in the assertion of the general right which the law gives to fish in such rivers (b), and in ignorance or in contestation of the exclusive right of fishing in it claimed by another, would not be liable to conviction of "unlawfully and wilfully" fishing in the private fishery of another (c).

§ 132. **Ignorance as a Defense.**—But how far ignorance or erroneous belief of a fact which is essential to the offence is material, is a question which has given rise to some controversy and conflict of decisions.<sup>123</sup> It seems that where the act done is one *prima facie* or usually lawful, calling for no explanation or excuse, and is unlawful only under exceptional circumstances, ignorance or erroneous belief regarding those circumstances, is to be regarded as establishing the absence of *mens rea* (d). Where a railway Act which "for the better prevention of accidents or injury which might arise" on the railway "from the unsafe and improper carriage of certain goods," enacted that every person who should send gunpowder or similarly dangerous articles by the railway should mark or declare their nature, under a penalty enforceable by imprisonment, it was held that guilty knowledge was essential to a conviction, and that an agent who had sent some cases of dangerous goods by a railway, without mark or declaration, not only in ignorance of their nature, but misinformed of it by his principal in answer to his inquiries, had not incurred the penalty; on the ground that his ignorance, under such circumstances proved the absence of *mens rea* (e); and yet he was under no legal duty to send the goods, and he might have refused to do so without actual inspection. A similar conclusion was come to where, although there was no knowledge, there were means of knowledge which were neglected. Under the

(a) *R. v. Tinkler*, 1 F. & F. 513.  
(b) *Carter v. Murcot*, 4 Burr. 2163.

(c) *R. v. Stimpson*, 4 B. & S. 301, 32 L. J. 208. See *supra*, § 119.

<sup>123</sup> See § 129.

(d) See *R. v. Speed*, 1 Lord Raym. 583; *R. v. Burnaby*, 2 Id. 900; *Legg v. Pardoe*, 9 C. B. N. S. 289; *Barton v. R.*, 2 Moo. P. C. 19.

(e) *Heane v. Garton*, 2 E. & E. 66.

9 & 10 Wm. 3, c. 14, which after reciting that convictions for embezzling government stores were found impracticable, because direct proof of the immediate taking could rarely be made, but only that the goods were found in the possession of the accused, and that they bore the king's mark, enacted that the person in whose possession goods so marked should be found, should forfeit the goods and 200*l.*, unless he produced at the trial an official certificate of the occasion of their coming into his possession, it was held by the Court for Crown cases reserved, that such a person was not liable to conviction, in the absence of proof that he knew (though he had reasonable means of knowing,) that the goods bore the government mark (*a*). [So, where a statute subjected the master of a steamboat to a penalty for failing to deliver any letter that he should have "in his care or within his power," it was held that there must, in order to guilt, be knowledge on his part, and that the mere possession of the letter by the clerk of his boat was not enough.<sup>124</sup>]

(*a*) *R. v. Sleep*, 1 L. & C. 44; 30 L. J. M. C. 170; *R. v. Wilmet*, 3 Cox, 281; *R. v. Cohen*, 8 Cox, 41. This decision, however, might be questioned, on the authority of another case, which was not cited, where the Court of Exchequer held that a dealer in tobacco was liable to the penalty imposed by the Statute for having adulterated tobacco in his possession, though ignorant of the adulteration. (5 & 6 Vict. c. 93; *R. v. Woodrow*, 15 M. & W. 404. See also *per Parke, B.*, in *Burnby v. Bollett*, 16 M. & W. 644; *R. v. Trew*, 2 East, P. C. 821; *R. v. Dixon*, 3 M. & S. 11, 4 Camp. 12.) It may be doubted whether the literal construction of the language, enforcing vigilance for the protection of the public from danger or robbery, by visiting negligence (comp. *R. v. Stephens*, and *R. v. Walter*, cited *infra*, § 135) as well as misdeed with penal consequences, would not have been more in harmony with the intention, and have more completely promoted the object of the Legislature. See *Aberdare v. Hammett*, L. R. 10 Q. B. 162; also a case reported only in the *Law Times*, where a person "found in possession of the young

of salmon," in contravention of the Salmon Fisheries Act, 24 & 25 Vict. c. 109, s. 15, was held not liable to conviction, who, though he knew he was in possession, did not know the fish were salmon: *Hopton v. Thirlwall*, 9 L. T. N. S. 327. [But see *State v. Probasco*, 62 Iowa, 400, where, under a statute making it unlawful for the keeper of a billiard hall "to permit any minor . . . to remain in such hall," a keeper might be convicted without proof that he knew of the presence of a person who was a minor, or the fact of such person's being a minor. In *Jamison v. Burton*, 43 Iowa 282, the sale of intoxicating liquors to a minor was held to be an offence, although the seller did not know that the buyer was a minor, — *cit. State v. Hatfield*, 24 Wis. 60. But see *contra*, *Miller v. State*, 3 Ohio St. 475.]

<sup>124</sup> *U. S. v. Beaty*, *Hemps*. 487. See also, as to when knowledge is necessary to, and ignorance a relief from, liability: *Barlow v. U. S.*, 7 Pet. 404; *Giltner v. Gorham*, 4 McLean, 402; *U. S. v. Taylor*, 5 Id. 242; *Lee v. Lacey*, 1 Cranch C. Ct. 263.

§ 133. On the other hand, where the act done is in its nature a breach of the law by the person who does it, and is divested of that character only when a certain fact exists, the person who does the act in ignorance of that fact, or in erroneous belief respecting it, cannot be said to do it innocently, and is not excused by his ignorance or mistake. Thus, a married woman who married a second husband would be guilty of bigamy, though she honestly believed that the first was dead (*a*). So, the offence of unlawfully taking a girl under sixteen out of the possession and against the will of her parents, would be committed, although the offender believed, from her appearance and asseverations contrary to the fact, that she was older (*b*). [And under an act making it an indictable misdemeanour to obstruct any public road, the intent was held to be immaterial.<sup>126</sup>] If ignorance or mistaken belief in such cases disproved the mens rea, a man indicted for burglary would be entitled to an acquittal on proof that when he broke into the house, he wrongly believed it was past 6 A. M. (*c*). It was held, that an Act which punishes an assault on a police officer "in the execution of his duty," was broken by a person who assaulted an officer so engaged in private clothes, ignorant that he was an officer (*d*). The offence of receiving two or more lunatics in an unlicensed house is committed, though the persons were received in the belief, based on reasonable grounds, that they were not lunatics (*e*). Under the special Act which empowered a gas company to make the necessary works for its business, subject to a penalty if it should "suffer any washings to be conveyed or to flow" into any stream or place, corrupting or fouling the water, the company was held liable to the penalty in a case where the washings percolated through the bottom of its gas tank and polluted a well without the knowledge of its servants (*f*).

(*a*) 24 & 25 Vict. c. 100; *R. v. Gibbons*, 12 Cox, 237, overruling *R. v. Horton*, 11 Cox, 145, 670.

(*b*) *R. v. Prince*, L. R. 2 C. C. 154. See also *R. v. Olifier*, 10 Cox, 402; *R. v. Mycock*, 12 Cox, 28; *R. v. Booth*, *Id.* 231; *R. v. Robins*, 1 C. & K. 456.

<sup>126</sup> *McKibbin v. State*, 40 Ark. 480.

(*c*) *Per Bramwell, B.*, in *R. v. Prince*, *ubi sup.*

(*d*) 2 & 3 Vict. c. 47, s. 18; *R. v. Forbes*, 10 Cox, 362.

(*e*) 8 & 9 Vict. c. 100, s. 44; *R. v. Bishop*, 5 Q. B. D. 259.

(*f*) *Hipkins v. Birmingham Gas Co.*, 6 H. & N. 43, 30 L. J. Ex. 60. [And see ante, § 132.]

§ 134. There is another class of cases where the absence of mens rea does not control the language of a Statute; and that is where the offence has been committed in ignorance or misapprehension of the law, and the Statute prohibiting the act does not expressly make malice or wilfulness or other intent an essential element of the offence (*a*). [In general, where, by common law, or statute, the doing of a thing is forbidden, the doing of it wilfully, though without any corrupt motive, is indictable;<sup>126</sup> and where a statute does not require the acts declared by it punishable to have been done, in order to be so, knowingly, and they are not *malum per se*, nor infamous, but only wrong because prohibited, a criminal intent need not be proved, the offender being bound to know the law and obey it at his peril.<sup>127</sup>] A man who unlawfully fished in a non-tidal river, or trespassed on land in search of game, would not escape conviction because he honestly believed that the public was entitled to fish or shoot there (*b*); such a right not being known to the law. An apprentice who absented himself from his master's service, did not escape the penal consequences by proving that he had done so in the honest though erroneous belief, founded on his lawyer's advice, that his indentures were void, and that he was consequently at liberty to leave his service (*c*). So, a cabman who persists in placing his cab on the premises of a railway company, after being requested to remove it, is penally liable for "wilfully trespassing and refusing to quit," though he was under the persuasion, which was

(*a*) See *Ellis v. Kelly*, 6 H. & N. 222, 30 L. J. M. C. 35; *Daniel v. Jones*, 2 C. P. D. 351.

<sup>126</sup> *People v. Norton*, 7 Barb. (N. Y.) 477; and see *People v. Bogart*, 3 Park. Cr. (N. Y.) 153; 3 Abb. Pr. 193; *U. S. v. Adams*, 2 Dak. 305.

<sup>127</sup> *U. S. v. Leathers*, 6 Sawyer, 17; and see *Smith v. Brown*, 1 Wend. (N. Y.) 231. That a man, at least in a civil matter, need not know the law of his State better than its Supreme Court, see *Geddes v. Brown*, 5 Phila. (Pa.) 180, ante, § 1, note 1. Comp. post, § 136:

*Morris v. People*, 3 Denio (N. Y.) 381.

(*b*) *Hudson v. McRae*, 4 B. & S. 585, 33 L. J. M. C. 65; *Leath v. Vine*, 30 L. J. M. C. 207; *Hargreaves v. Diddams*, L. R. 10 Q. B. 582; *Watkins v. Major*, L. R., 10 C. P. 662. See also *The Charlotta*, 1 Dods. 387.

(*c*) 4 Geo. 4, c. 34, s. 3; *Cooper v. Simmons*, 7 H. & N. 707, 31 L. J. M. C. 138, overruling *Rider v. Wood*, 29 L. J. M. C. 1. See also *Willett v. Boote*, 6 H. & N. 26, 30 L. J. M. C. 6; and *Youle v. Map-pin*, 30 L. J. M. C. 234, 6 H. & N. 753.

unfounded, that there existed a legal right to place his vehicle there (*a*).

§ 135. **Liability of Master for Servant's Act.**—The principle that mens rea is essential to criminality is subject, in some classes of misdemeanors, and especially in cases of libel and nuisance, to the more general one which makes a master responsible for the wrongful act or default of his servant in the course and within the scope of his employment, when the servant is not forced upon him by law, and the work on which he is employed is for the employer's private advantage or profit, and not in the discharge of a public duty (*b*). [Thus, where liquor was sold, or a gaming table kept, in violation of law, by an agent, the employer was held liable to the penalty.<sup>128</sup>] In such cases, the act of the servant, though not in obedience, and even contrary to his master's orders, is yet taken to be the act of the master, and the latter has in some of such cases been held penally responsible for it, though personally ignorant of its committal. Thus, a baker has been held liable to a penalty for selling bread in which his servant had, without his knowledge, mixed alum (*c*). The owner of works carried on by his agents and workmen for his profit, was held indictable for a nuisance committed by them in the course and within the scope of their employment, although they had, in committing it, acted against his orders (*d*). So, newspaper proprietors have been repeatedly held indictable and punishable by fine and imprisonment for a libel of which they had no knowledge, inserted by their editor and sold by their publisher in their paper (*e*). It has

(*a*) *Foulger v. Steadman*, L. R. 8 Q. B. 65. *Comp. Jones v. Taylor*, 1 E. & E. 20.

(*b*) See the cases collected in *Holliday v. St. Leonard*, 11 C. B. N. S. 192, 30 L. J. 361; *Hartnall v. Ryde Commissioners*, 4 B. & S. 361, 33 L. J. 39; *Ohrby v. Id.*, 5 B. & S. 743, 33 L. J. 296; *Coe v. Wise*, 5 B. & S. 440, 33 L. J. 281; *Tobin v. Reg.*, 33 L. J. 199, 204, 16 C. B. N. S. 310. See also *Davies v. Harvey*, L. R. 9 Q. B. 433; *Stanley v. Dodd*, 1 D. & R. 184.

<sup>128</sup> *U. S. v. Voss*, 1 Cranch C. Ct. 101; *U. S. v. Conner*, Id. 102.

(*c*) *R. v. Dixon*, 3 M. & S. 11.

See *Parsons v. St. Matthews*, L. R. 3 C. P. 56; *Wilson v. Halifax*, L. R. 3 Ex. 114; *Mullins v. Collins*, L. R. 9 Q. B. 292. [But see *Noll v. State*, 34 Ala. 262; *Mitchell v. Mims*, 8 Tex. 6; *State v. Bacon*, 40 Vt. 456, to the effect that a principal is not liable for the act of his agent without his express authority.]

(*d*) *R. v. Stephens*, 1 Q. B. 792; and see *Tuberville v. Stamp*, 1 Lord Raym. 264, Carth. 425.

(*e*) *R. v. Walter*, 3 Esp. 21; *R. v. Gutch, M. & M.* 443; *R. v. Cutbell*, *Erskine's Speeches*, Vol. 5. See *Scarlett's Argument in R. v.*

been said that the principal or master is liable in such cases, because he supplies the concern with the capital and reaps the profits (*a*). At all events, he carries on a business in which wrongful acts may be and even are apt to be committed by his agents and servants over whom he has absolute control, and whom therefore he can by the exercise of due diligence, prevent from doing wrongful acts; and his ignorance is the result of negligence (*b*).

§ 136. **Mens Rea and Guilty Mind.**—It is necessary, as regards mens rea, not to confound a guilty mind, in the legal sense of the expression, with a guilty conscience or evil intention. A statute which prohibited an act would be violated, though the act were done without evil intention, or even under the influence of a good motive. Thus, a man who sells an obscene publication is subject to the penalty imposed on that act by the 20 & 21 Vict. c. 83, although his object was not to deprave the mind of the reader, but to expose the tenets of a religious sect (*c*). The master of a ship who, under general instructions to complete his cargo on the best terms, traded with the enemy, would be guilty of the crime (*d*) of barratry, though he acted solely under the motive of serving his employer to the best advantage (*e*). A railway company which had suffered a weighing machine in its possession to continue out of repair for a fortnight, so that it indicated more than the true weight, was held to fall within the enactment which imposed a penalty for being found in possession of a weighing machine incorrect or otherwise unjust; although its servants had orders to make a due allowance for the defect, when using it (*f*). [So,

Burdett, given in his Life by his son, App. p. 321. As regards the present liability of newspaper proprietors, see 6 & 7 Vict. c. 96, s. 7, and *R. v. Holbrook*, 3 Q. B. D. 60, 47 L. J. Q. B. 35.

(*a*) *Per* Lord Tenterden in *R. v. Gutch*, ubi sup. Comp. The Newport, 10 Moo. 155. [But see *Com'th v. Buckingham*, Thach. Cr. Cas. (Mass.) 29, that evidence that the editor, at the time of the publication, was absent from town and had no concern in the publication of the number containing the libel, is admissible as going to the intent.]

(*b*) In this respect, indeed, it is remarkable that the criminal liability is more extensive than the civil. See *per* Byles, J., in *Parkes v. Prescott*, L. R. 4 Ex. 182.

(*c*) *R. v. Hicklin*, L. R. 3 Q. B. 360; *Steele v. Brannan*, L. R. 7 C. P. 261.

(*d*) *Vallejo v. Wheeler*, Cowp. 143.

(*e*) *Earle v. Rowcroft*, 8 East, 126.

(*f*) 5 & 6 Wm. 4, c. 63, s. 28; *Great Western R. Co. v. Bailie*, 5 B. & S. 928, 34 L. J. M. C. 31.

where supervisors were by law directed to audit and allow the accounts of certain judicial officers, and in case of neglect or refusal were subjected to a penalty, it was held that the latter was incurred by the mayor of a city, acting as supervisor, who refused to audit an account of this class, because the officer whose account was offered for audit, was, as he honestly believed,<sup>129</sup> unconstitutionally appointed.<sup>130</sup> And a justice of the peace was held liable for a misdemeanor in refusing to take an affidavit in a cause before him, though he acted in good faith in his refusal.<sup>131</sup> So, under sec. 96, of the act of Congress of 20 July, 1868, a breach of its provisions as to the construction of a distillery, is "knowingly and wilfully" committed, and the penalty incurred, although the departure from the prescribed details was for an honest purpose and not followed by an abstraction of liquor.<sup>132</sup>]

§ 137. **Restriction of General Terms to Particular Parties.**— Sometimes, to keep the Act within the limits of its object, and not to disturb the existing law beyond what that object requires, it is construed as operative between certain persons, or under certain states of facts, or for certain purposes only, though the language expresses no such circumscription of the field of its operation. The Act of 1854, for instance, which required, among other things, that when a bill of sale was made subject to a declaration of trust, the declaration should be registered as well as the bill, on pain of invalidity against the assignee, in the event of execution or bankruptcy, was held to apply only to declarations of trusts by the grantee for the grantor, but not to trusts declared by the grantee in favor of other persons; the object of the Act being only to protect creditors against sham bills of sale, and being completely attained by requiring the registration of the first-mentioned trusts; while the registration of any others would have been foreign to the purposes of the Act (a). So, the general language of the Merchant Shipping

<sup>129</sup> On the strength of a decision of the court of last resort in the State, in another case: see *Purdy v. People*, 4 Hill (N. Y.) 384.

<sup>130</sup> *Morris v. People*, 3 Denio (N. Y.) 381.

<sup>131</sup> *People v. Brooks*, 1 Denio (N. Y.) 457.

<sup>132</sup> *U. S. v. McKim*, 3 Pitts. Rep. 155.

(a) *Hills v. Shepherd*, 1 F. & F. 191; *Robinson v. Collingwood*, 34



Act of 1854, s. 299, which provides that, if damage should arise to person or property from non-observance of the sailing rules, it should be considered as the wilful default of the person in charge of the deck at the time, was confined by a due regard to the object in view, to the regulation of the rights of the owners of ships in cases of collision, and was therefore held not to affect the relations between the master and his owners, so as to make the former guilty of barratry, which would have been altogether foreign to the scope of the Act (*a*).

The enactment (16 & 17 Vict. c. 59, s. 19) which makes presentment of any draft on a banker payable to order or on demand, if purporting to be indorsed (though a forgery) by the payee, a sufficient authority to the banker to pay the amount, is in the same way limited in its effect, as in its object, to the relations between banker and customer; and does not prevent the latter from recovering his money from the person who received it (*b*). The 16th section of the Companies Clauses Consolidation Act, which provides that no shareholder shall be entitled to transfer any share after a call, until he has paid up all calls due on all his shares, is only a protection to the company, giving it a lien

L. J. C. P. 18, 17 C. B. N. S. 777. See also *Hodson v. Sharpe*, 10 East, 350. So, the provision in the 8 & 9 Vict. c. 109, which, after making all wagers null and void enacts that no suit shall be maintained to recover money won on a wager or deposited to abide the event, is construed as only preventing a party to the wager from suing to recover his winning, but not to prevent him from suing the stakeholder to recover his deposit: *Hampden v. Walsh*, 1 Q. B. D. 189. [*Comp. Kelly v. Bartley*, 1 Sandf. (N. Y.) 15; *O'Maley v. Reese*, 6 Barb. (N. Y.) 658; *Vischer v. Yates*, 11 Johns. (N. Y.) 23; *Storey v. Brennan*, 15 N. Y. 524; *Parmelee v. Rogers*, 26 Ill. 56; *Stephens v. Sharp*, Id. 404; *Wood v. Duncan*, 9 Port. (Ala.) 227; *Schackelford v. Ward*, 3 Ala. 37; *Ivey v. Phifer*, 11 Id. 535; *Moore v. Trippe*, 20 N. J. L. 263; *Sutphin v. Crozer*, 30 Id. 257; *McAllister v. Hoffman*, 16 S. & R.

(Pa.) 147; *Reichly v. Maclay*, 2 Watts & S. (Pa.) 59; *App v. Corryell*, 3 Pen. & W. (Pa.) 494; *Conklin v. Conway*, 18 Pa. St. 329; *Hardy v. Hunt*, 11 Cal. 343; *Whitwell v. Carter*, 4 Mich. 329; *House v. McKenney*, 46 Me. 94; *Perkins v. Eaton*, 3 N. H. 152; *Humphreys v. Magee*, 13 Mo. 435; *Burroughs v. Hunt*, 13 Ind. 178; *Hutchins v. Stilwell*, 18 B. Mon. (Ky.) 776; *Livingston v. Wootan*, 1 N. & M. S. C.) 178; *Bledsoe v. Thompson*, 6 Rich. (S. C.) 44; *Corley v. Berry*, 1 Bailey (S. C.) 593; *Forrest v. Hart*, (3 Murph. (N. C.) 458; *Alford v. Burke*, 21 Ga. 46; *Jacobs v. Walton*, 1 Harr. (Del.) 496; *Reynolds v. McKinney*, 4 Kan. 94; *Perkins v. Hyde*, 6 Yerg. (Tenn.) 288; *Shain v. Searcy*, 20 Tex. 123.]

(*a*) *Grills v. The General Iron Screw Co.*, L. R. 1 C. P. 600, 3 C. P. 476.

(*b*) *Ogden v. Benas*, L. R. 9 C. P. 513.

or charge upon the shares ; but it does not affect the validity of a transfer as regards the creditors of the company, if the company has assented to it (a). So, it has been held that the provisions of a railway Act which place the management of the company's affairs in the hands of a certain number of directors, were intended for the protection of the shareholders merely, and that it was not open to a stranger to object that they had not been complied with (b). [So, where an act of Congress provided that the total liability of any one borrower from a national bank should at no time exceed one tenth of the amount of the capital stock of the bank actually paid in, and a bank made loans to a person in excess of the amount so prescribed, it was held that this limitation was intended as a general rule for conducting the business of the bank, to protect the latter, its stockholders and creditors from unwise banking, and in holding the loan, not to be irrecoverable by reason of the limitation and excess, the Court said : " We should not interpret the section so as to carry its prohibition beyond its true purpose, and thus cause it to destroy the very interest it intended to protect by the regulation."<sup>133</sup>] The 38th section of the Companies Act of 1867, which requires that every prospectus shall specify all contracts entered into by the company or by its promoters, before the issue of the prospectus, and declares every prospectus which does not specify them, fraudulent on the part of the promoters and directors who knowingly issued it, as regards persons taking shares, is, literally, wide enough to include every contract made by a promoter even regarding his own private affairs ; but it was limited in construction to the objects of the Act, which was the protection of shareholders. It was held, therefore, to include only such contracts as were calculated to influence persons in applying for

(a) *Littledale's Case*, L. R. 9 Ch. 257.

(b) *Thames Haven Co. v. Rose*, 4 M. & Gr. 552.

<sup>133</sup> *O'Hare v. Bank*, 77 Pa. St. 96, 103. Compare *Penn v. Bornman*, 102 Ill. 523, where, *Dickey*, *Craig and Sheldon, JJ.*, dissenting, it was held, that, under a bank charter forbidding a director to

become indebted to the bank, a director, who, at the same time, was the president of a company which had borrowed money from the bank, and who, for this debt, gave the bank his draft upon the treasurer of his company, incurred no liability by the same. Compare post, § 268.

shares (a); but not to create any duty towards bondholders (b). [A familiar instance of this species of construction is that which has been applied to statutes relating to usury and declaring usurious contracts void, either entirely or to the extent of the excess over legal interest. In many instances, these statutes have been regarded as giving a defence only to the borrower, a defense personal to himself and his privies, among which have been variously included sureties,<sup>134</sup> accommodation indorsers,<sup>135</sup> representatives, heirs and the like;<sup>136</sup> in others it has been held, that, where the contract would be void as to him, it would be good as against a third party, *e. g.*, a purchaser of the equity of redemption subject

(a) *Twycross v. Grant*, 2 C. P. D. 469.

(b) *Cornell v. Hay*, L. R. 8 C. P. 328.

<sup>134</sup> But see contra: *Lamville*, etc., B'k v. Bingham, 50 Vt. 105; and see *Culver v. Wilbern*, 48 Iowa, 26; *Swift v. Adkins*, 2 Lea (Tenn.) 137.

<sup>135</sup> But see *Allerton v. Belden*, 49 N. Y. 373; *Stewart v. Bramhall*, 18 N. Y. Supr. Ct. 139; *Cadys v. Goodnow*, 49 Vt. 400; *Kendall v. Vanderlip*, 2 Mackey (D. C.) 105. *Comp. Macungie Sav. B'k v. Hottenstein*, 89 Pa. St. 328; *Bly v. Bank*, 79 Id. 453 (cases of novation).

<sup>136</sup> See *Ohio*, etc., *R. R. Co. v. Kasson*, 37 N. Y. 218; *Bullard v. Raynard*, 30 Id. 197; *Billington v. Wagoner*, 33 Id. 81; *Williams v. Tilt*, 36 Id. 319; *Merch. Exch. Nat. B'k v. Comm. Warehouse Co.*, 33 Id. 317; *Bank v. Edwards*, 1 Barb. (N. Y.) 271; *Fullerton v. McCurdy*, 4 Lans. (N. Y.) 132; *Dix v. Van Wyck*, 2 Hill (N. Y.) 522; (but see *Chamberlain v. Dempsey*, 14 Abb. Pr. (N. Y.) 241; *Cole v. Savage*, 10 Paige (N. Y.) 583; *Post v. Dart*, 8 Id. 639; *Brooks v. Avery*, 4 N. Y. 225; *Green v. Kemp*, 13 Mass. 515; *Bridge v. Hubbard*, 15 Id. 96; *Com'th v. Weiher*, 3 Met. (Mass.) 445; *Henderson v. Bellew*, 45 Ill. 322; *Valentine v. Fish*, Id. 462; *Essley v. Sloan*, 116 Id. 391; *Huston v. Stringham*, 21 Iowa, 36; *Carmichael v. Bodfish*, 32 Id. 418; *Fenno v. Sayre*, 3 Ala. 458; *Cain v. Gimon*, 36 Id. 168; *Gray v.*

*Brown*, 23 Id. 262; *McGuire v. Van Pelt*, 55 Id. 344; *O'Neil v. Cleveland*, 30 N. J. Eq. 273; *Lee v. Stiger*, Id. 610; *Farmer's & Mech. B'k v. Kimmel*, 1 Mich. 84; *Loomis v. Easton*, 32 Conn. 550; *Austin v. Chittenden*, 33 Vt. 553; *Reed v. Eastman*, 50 Id. 67; *Newbury B'k v. Sinclair*, 60 N. H. 100; *Bensley v. Homier*, 42 Wis. 631; *Ready v. Huebner*, 46 Id. 692; *Draper v. Emerson*, 22 Id. 147; *Lazear v. Bank*, 52 Md. 78; (but see *Thom v. Doub*, 8 Gill & J. (Md.) 1; *Ransom v. Hays*, 39 Mo. 445; *Cramer v. Lepper*, 26 Ohio St. 59; *Smith v. Bank*, Id. 141; *Stephen v. Muir*, 8 Ind. 352; *Conwell v. Pumphrey*, 9 Id. 135; *Wright v. Bundy*, 11 Id. 398; *Stein v. Indianapolis*, etc., *Ass'n*, 18 Id. 237; *Stockton v. Coleman*, 39 Id. 107; *Studabaker v. Marquardt*, 55 Id. 341 (but see *Cole v. Bansemer*, 26 Id. 94); *Campbell v. Johnston*, 4 Dana (Ky.) 177; *Pritchett v. Mitchell*, 17 Kan. 355; *Pickett v. Bank*, 32 Ark. 346; *Spengler v. Snapp*, 5 Leigh (Va.) 478; *Lea v. Feamster*, 21 W. Va. 108. But see contra: *McAlister v. Jerman*, 32 Miss. 142 (comp. *Dennistown v. Potts*, 26 Id. 13); *Cummins v. Wire*, 6 N. J. Eq. 73 (comp. *Dolman v. Cook*, 14 Id. 56; *Conover v. Hobart*, 24 Id. 120); *Green v. Tyler*, 39 Pa. St. 361; *Link v. Assoc'n*, 89 Id. 15; *Schutt v. Evans*, 109 Id. 625 (accomp. endorser); *Nisbett v. Walker*, 4 Ga. 221.

to an usurious mortgage, except as to illegal interest, which was to be deducted;<sup>137</sup> and in others, again, it has been decided that the defense could not be set up against a bona fide holder of the debt without notice of the usury;<sup>138</sup> and again, that the lender cannot avoid his contract on the ground of usury.<sup>139</sup> So, a bond given by way of margin, to secure the settlement of differences in a stock gambling transaction, may be void as between the original parties, but valid in the hands of an innocent assignee for value.<sup>140</sup> And even as between the original parties, if one of them intended a bona fide purchase or sale, the contract will be good as to him and enforceable by him, unaffected by the secret corrupt intent of the other.<sup>141</sup>]

§ 138. **Presumption against Permitting Evasion.**—It is the duty of the judge to make such construction as shall suppress all evasions for the continuance of the mischief (*a*). To carry out effectually the object of a statute, it must be so construed as to defeat all attempts to do or avoid in an indirect or circuitous manner that which it has prohibited or enjoined (*b*). In fraudem legis facit, qui, salvis verbis legis, sententiam ejus circumvenit (*c*); and a statute is understood as extending to all such circumventions, and rendering them unavailing. Quando aliquid prohibetur, prohibetur et omne per

<sup>137</sup> See *Ladd v. Wiggin*, 35 N. H. 421.

<sup>138</sup> See *Jackson v. Bowen*, 7 Cow. (N. Y.) 13; *Powell v. Waters*, 8 Id. 669; *Kent v. Walton*, 7 Wend. (N. Y.) 256; *Hackley v. Sprague*, 10 Id. 113; *Smedburg v. Simpson*, 2 Sandf. (N. Y.) 85 (but see *Hall v. Ernest*, 36 Barb. 585); *Smalley v. Doughty*, 6 Bosw. (N. Y.) 66; *Conkling v. Underhill*, 4 Ill. 388; *Freeman v. Brittin*, 17 N. J. Eq. 191; *Creed v. Stevens*, 4 Whart. (Pa.) 223; *Clapp v. Hanson*, 15 Me. 345; *Thomasson B'k v. Stimpson*, 21 Id. 195; *Forbes v. Marsh*, 3 N. H. 119; *Gross v. Funk*, 20 Kan. 655; *Partridge v. Williams*, 72 Ga. 807 (note assigned as coll. security); and see *Mitchell v. McCullough*, 59 Ala. 179; *Rochester B'k v. McLeod Co.*, 27 Minn. 87. But see contra: *Lloyd v. Scott*, 4 Pet. 205; *Kendall v. Rob-*

*ertson*, 12 Cush. (Mass.) 156 (comp. act 1863, ch. 242); *True v. Triplett*, 4 Metc. (Ky.) 57; and see *McCullough v. Mitchell*, 64 Ala. 250; *Bank of Washington v. Arthur*, 3 Gratt. (Va.) 173.

<sup>139</sup> *Elwell v. Chamberlain*, 4 Bosw. (N. Y.) 320; *Gloversville B'k v. Peace*, 15 Hun (N. Y.) 564; *Riley v. Gregg*, 16 Wis. 606.

<sup>140</sup> See *Griffiths v. Sears*, 112 Pa. St. 523. But see *Unger v. Boas*, 13 Id. 600; *Tenney v. Foote*, 4 Ill. App. 594.

<sup>141</sup> *Williams v. Tiedeman*, 6 Mo. App. 269. See, to similar effect, *Wall v. Schneider*, 59 Wis. 352; and compare *Bartlett v. Smith*, 4 McCrary, 388.

(*a*) *Magdalen College Case*, 11 Rep. 716.

(*b*) *Bac. Ab. Statute J.*; *Com. Dig. Parlmt. R.* 28.

(*c*) 3 Dig. 1, 3, 29.

quod devenitur ad illud (*a*). When the acts of the parties are adopted for the purpose of effecting a thing which is prohibited, and the thing prohibited is in consequence effected, the parties have done that which they have purposely caused, though they may have done it indirectly (*b*). When the thing done is substantially that which was prohibited, it falls within the Act, simply because, according to the true construction of the statute, it is the thing thereby prohibited (*c*). Whenever Courts see such attempts at concealment, "they brush away the cobweb varnish," and show the transaction in its true light (*d*). They see things as ordinary men do (*e*), and see through them. Whatever might be the form or color of the transaction, the law looks to the substance of it (*f*). [So it was said with reference to a statute which forbade preferences in assignments for benefit of creditors, that the form of the transaction was not material, so long as it amounted to an absolute transfer of the debtor's property for that purpose;<sup>142</sup> and that the law could not be evaded "by any sham departure from the general form of assignments."<sup>143</sup> And concerning] the Usury Act, it was said that if the contract really was an usurious loan of money, the wit of man could not find a shift to take it out of the Act (*g*). So, if the contract be a wager in substance, no matter how the end is brought about, it would be void, though the object were ever so cunningly concealed in the form given to the transaction (*h*); [*e. g.*, a written promise to pay a sum of money, or a promissory note payable on the happening of a contingency which is the subject

(*a*) 2 Inst. 48.

(*b*) *Per* Blackburn, J., in *Jeffries v. Alexander*, 31 L. J. Ch. 148, 8 H. L. 594.

(*c*) *Per* Lord Cranworth in *Philpott v. St. George's Hospital*, 6 H. L. 338, 27 L. J. Ch. 72.

(*d*) *Per* Wilmot, C. J., in *Collins v. Blantern*, 2 Wils. 349.

(*e*) *Per* Brougham in *Warner v. Armstrong*, 3 M. & K. 45.

(*f*) *Per* Lord Tenterden in *Solarte v. Melville*, 1 Man. & Ry. 204.

<sup>142</sup> *Johnson's App.*, 103 Pa. St. 373, 377.

<sup>143</sup> *Fallon's App.*, 42 Pa. St. 235. See, however, post, § 145.

(*g*) *Per* Lord Mansfield in *Floyer v. Edwards*, Cowp. 114; [*Mills v. Building Assoc'n*, 75 N. C. 292; *Martin v. Building Assoc'n*, 2 Cold. (Tenn.) 418, citing Lord Coke's warning: "To them that lend money, my caveat is, that, neither directly nor indirectly, by art or cunning invention, they take above six in the hundred; for they that seeke by slight to creepe out of these statutes, will deceive themselves and repent in the end."]

(*h*) *Tate v. Wellings*, 3 T. R. 531; *Boldero v. Jackson*, 11 East, 612; *White v. Wright*, 3 B. & C. 273.

of the wager;<sup>144</sup> an agreement between two persons, by which one was to sell and the other to buy a lot of hogs at a certain sum per pound, payable upon the happening of the contingency;<sup>145</sup> a policy of insurance taken upon the life of another by one who has no insurable interest in the insured;<sup>146</sup> a contract to deliver goods or stocks at a future day, the real intent of which is not to deliver the goods or stocks at all, but to speculate in the rise and fall of their prices, the one party to pay to the other the difference between the contract price and the market price upon the date fixed for the execution of the contract.<sup>147</sup>]

§ 139. An Act which prohibited under a penalty the performance of plays without license, would extend to a performance where the actors did not come on the stage, but acted in a chamber below it, and their figures were reflected by mirrors so as to appear to the spectators to be on the stage (*a*). Lord Campbell's Act, which requires, under certain circumstances, the insertion of a full apology in a newspaper, for a libel, would not be complied with, if the apology, however suitable in its terms, was printed in such type

<sup>144</sup> *Guyman v. Burlingame*, 36 Ill. 201; *Sipe v. Finarty*, 6 Iowa, 394; *Given v. Rogers*, 11 Ala. 543; *Nudd v. Barnett*, 14 Ind. 25.

<sup>145</sup> *Lucas v. Harper*, 24 Ohio St. 328.

<sup>146</sup> *Warnock v. Davis*, 104 U. S. 775; *Gilbert v. Moose*, 104 Pa. St. 74; and see *Blattenberger v. Holman*, 103 Id. 555, as to the assignee of such with knowledge of the fraud.

<sup>147</sup> *Irwin v. Williar*, 110 U. S. 499; *Hentz v. Jewell*, 4 Woods, 656; *Kirkpatrick v. Adams*, 20 Fed. Rep. 287 (cotton futures); *Bartlett v. Smith*, 4 McCrary, 388 (wheat); *Story v. Solomon*, 71 N. Y. 420; *Kingsbury v. Kirwan*, 77 Id. 612; *Yerkes v. Solomon*, 18 N. Y. Supr. Ct. 471; *Beveridge v. Hewitt*, 8 Ill. App. 467; *Pickering v. Cease*, 79 Ill. 328; *North v. Phillips*, 89 Pa. St. 250; *Griffiths v. Sears*, 112 Id. 523; *Rumsey v. Berry*, 65 Me. 570; *Barnard v. Backhaus*, 52 Wis. 593 (grain); *Waterman v. Buckland*, 1 Mo. App. 45; *Williams v. Tiedeman*, 6

*Id.* 269. But the mere fact that goods or stocks are sold to be delivered at a future date, which are not, at the time of the making of the contract, in possession of the seller, does not make the transaction a wager, if there is an honest intention to deliver: *Bartlett v. Smith*, 4 McCrary, 388; *Cole v. Milmine*, 88 Ill. 349; *Maxton v. Gheen*, 75 Pa. St. 166; and see *Gilbert v. Gaugar*, 8 Biss. 214; *Barnard v. Backhaus*, 52 Wis. 593. And an agreement to share the profits and losses upon the sale of stocks owned by one of the parties thereto and bought by him through a broker on margin, is not a wager contract, nor illegal stockjobbing: *Bullard v. Smith*, 139 Mass. 492; a contract to deal in stocks on margin not being illegal, if the stocks are actually purchased and the contract is not one merely for the payment of differences: *Hatch v. Douglas*, 48 Conn. 116.

(*a*) 6 & 7 Vict. c. 68, s. 2; *Day v. Simpson*, 18 C. B. N. S. 680, 34 L. J. M. C. 149.

or in such a part of the paper as would be likely to escape the attention of ordinary readers (*a*). [An act providing that public notice of an intended application for a borough charter shall be given in at least one newspaper of the proper county, is not complied with unless the notice states the time and place, when and where the petition is to be presented.<sup>148</sup>] The Act of 1854 which required the registration of bills of sale of personal chattels, was held to extend to agreements for a bill of sale, constituting an equitable assignment (*b*). And where the grantor of a bill of sale of furniture remained in possession as the servant of the grantee, with leave to use the furniture as part of his salary, it was held that the grantee was not in possession by his servant, but that the grantor was in possession within the meaning, for the case was within the mischief, of the Act (*c*). [Where a statute forbids a married woman to make herself liable as a surety for the debt of another, her acceptance of a bill of exchange, drawn on her for the purpose of paying a debt due the drawer by a third party, is void.<sup>149</sup> And where she is prohibited, during her second marriage, from "alienating" such real estate as she may have acquired by virtue of her former marriage, that prohibition cannot be evaded by her mortgaging such property.<sup>150</sup> And so, where she is forbidden to convey her real estate without joinder of her husband and acknowledgment, she cannot bind herself by an agreement to convey, except with joinder of her husband and acknowledgment.<sup>151</sup> Under a statute prohibiting the standing of a jack and letting him to mares for profit and hire, without license, the standing of a jack under a contract to have the mules at a stipulated price, less than

(*a*) 6 & 7 Vict. c. 96, s. 2; Lafone v. Smith, 3 H. & N. 735, 28 L. J. Ex. 33.

<sup>148</sup> Rhoads' App., 101 Pa. St. 284. Whether such notice may be published in a weekly religious paper, was not decided.

(*b*) 17 & 18 Vict. c. 36; Exp. Mackay, L. R. 8 Ch. 643; Edwards v. Edwards, 2 Ch. D. 291; Branton v. Griffiths, 2 C. P. D. 212; Exp. Odell, 10 Ch. D. 76; but comp. Allsopp v. Day, 7 H. & N. 457; Byerley v. Prevost, L. R. 6 C. P.

144; Marsden v. Meadows, 7 Q. B. D. 80; Woodgate v. Godfrey, 5 Ex. D. 24.

(*c*) Pickard v. Marriage, 1 Ex. D. 364; Exp. Lewis, L. R. 6 Ch. 626. See another example in Stalard v. Marks, 3 Q. B. D. 412.

<sup>149</sup> Cooley v. Barcroft, 43 N. J. L. 363.

<sup>150</sup> Vinnedge v. Shaffer, 35 Ind. 341; even where there are no children: *Id.*

<sup>151</sup> Milwee v. Milwee, 44 Ark. 112; Felkner v. Tighe, 39 Id. 357.

the value, equally requires a license.<sup>152</sup> An agent selling tickets at a picnic, for which beer is furnished on presentation, may be convicted of selling liquor without license.<sup>153</sup> An instrument whereby one gave to another an irrevocable power of attorney, with the right to substitute other attorneys, to sell land to be granted to the maker as a colonist, to a certain person or to any one the latter should name, was held to be a contract to sell the land before issuance of title and void.<sup>154</sup> And a corporation whose charter did not allow it to sell coal, but which owned large quantities of coal land which it leased to others to be worked, was held to be within an act imposing certain taxes upon corporations possessing the right to mine or purchase and sell coal.<sup>155</sup> An act authorizing the issue of municipal bonds "at not less than par," but allowing councils to pay a reasonable compensation for the sale or negotiation of the bonds would not warrant the allowance of a commission to a purchaser of the bonds from the city at par; for that would be a sale at less than par.<sup>156</sup>]

§ 140. The Mortmain Act of Geo. 2, which prohibits the disposition to a charity, of land, or money to be laid out in the purchase of land, otherwise than by deed executed twelve months before the donor's death, to be enrolled within six months from its execution and to take effect immediately, and without power of revocation or any reservation for the benefit of the donor, has frequently been the subject of such experiments. Thus, a bequest of money to the committee of a school, on condition that they would provide land for a charitable purpose, would fall within the Act; for such a transaction differs but in name from a purchase of the land and a devise of it (*a*). The testator did not, indeed, directly devise the land; but he gave money in consideration of land being given to a charity, which was substantially the same thing. So, if money were bequeathed to be

<sup>152</sup> *Com'th v. Harris*, 8 B. Mon. (Ky.) 373.

<sup>153</sup> *Com'th v. Heffner*, 8 Leg. Gaz. (Pa.) 166.

<sup>154</sup> *Cooke v. Lindsay*, 57 Tex. 67.

<sup>155</sup> *Big Black Creek, etc., Co. v. Com'th*, 94 Pa. St. 450.

<sup>156</sup> *Whelen's App.*, 108 Pa. St. 162.

(*a*) *Atty.-Genl. v. Davies*, 9 Ves. 535; and see the judgment of Lord Cranworth in *Philpott v. St George's Hospital*, 6 H. L. 349.



laid out in building houses, where there was no land already in mortmain (*a*) to build them on, such a bequest would be construed as an indirect instruction to purchase land for the purpose (*b*). Where the owner of land, with the object of evading the statutes, executed a deed, which he kept concealed till his death, whereby he covenanted that he or his executors would pay to certain trustees for certain charitable purposes, a large sum of money, which would necessarily have to be raised out of his land, this was held to fall within the prohibition of the statute. The creation of a fictitious debt on which execution might issue, and the land be taken, was but an indirect mode of making a gift of the land (*c*). [Under an act imposing collateral inheritance tax on "estates by will . . . or . . . transferred by deed, grant, bargain or sale made or intended to take effect in possession or enjoyment after the death of the grantors," and requiring the executors to pay it, a person will not be permitted to evade the imposition by a conveyance of his estate during his life-time, even where possession is taken by the grantee before the grantor's death, if the enjoyment of the property conveyed is not intended to take effect until after his death.<sup>157</sup> And, where a decedent, during his life-time had assigned certain stock to a trustee, in trust that he would pay the assignor the income for life and, after his death, certain sums and annuities to persons named in the declaration of trust, if they survived, and the remainder to purposes to be declared in his will, reserving the right to revoke all the trusts declared, it was, after his death without such revocation, held that the sum assigned was subject to collateral inheritance tax, and that the executors were the persons from whom it was to be demanded.<sup>158</sup> Under an ordinance prohibiting persons from "erecting" or "building" wooden houses, etc., the elevation or enlargement of a wooden building, so

(*a*) *Comp. Brodie v. Chandos*, 1 Bro. C. C. 44n; and *Pritchard v. Arbouin*, 3 Russ. 456.

(*b*) *Atty.-Genl. v. Tyndall*, AmbL. 614; *Mather v. Scott*, 2 Keen, 172; *Giblett v. Hobson*, 3 M. & K. 517.

(*c*) *Jeffries v. Alexander*, 8 H. L. 594, 31 L. J. Ch. 9; and *per Cur. in Attree v. Hame*, 9 Ch. D.

337, 47 L. J. 863; *comp. Re Robson*, 19 Ch. D. 156, 51 L. J. 337.

<sup>157</sup> *Reish v. Com'th*, 106 Pa. St. 521.

<sup>158</sup> *Wright's App.*, 38 Pa. St. 507. And see *Tritt v. Crotzer*, 13 Id. 451. But see, under the act 32 & 33 Vict. c. 71, s. 87, post, § 144.

as materially to alter its character, was held to be punishable.<sup>159</sup>]

§ 141. So, a settlement, under the Poor law, by renting a tenement, was not obtained where the renting was colorable or fraudulent (*a*). It has been held that where a woman pregnant with an illegitimate child was fraudulently removed by the officers of the parish in which she was settled (*b*) to another parish, the child's settlement was not the parish where it was born, but that in which it would, but for the fraudulent removal, have been born (*c*). Indeed, it has been held that where an unmarried woman was removed to a parish by order of justices, and gave birth to a child there, and the order was quashed on appeal, the child was to be regarded as born in the parish where he ought to have been, and not where he actually was born (*d*). Where a woman, after failing to obtain a bastardy order where she resided, removed to a neighboring borough for the avowed purpose of trying to get the order there; it was held that the justices of the borough had no jurisdiction to make it, under the Act which gives such authority to justices of the place where the woman "resides" (*e*). It would have been different if she had not removed for the sole object of getting into another jurisdiction (*f*).

<sup>159</sup> *Douglass v. Com'th*, 2 Rawle (Pa.) 262. But see *Booth v. State*, 4 Conn. 65, where repairing and changing into a dwelling a building originally erected for a meeting house and subsequently used as a joiner's shop was held not to be an erection prohibited by statute; also, *Tuttle v. State*, Id. 68, as to removal, repair and addition; *Daggett v. State*, Id. 61, as to addition to a wooden building; and *Brown v. Hunn*, 27 Id. 332, as to the removal of a wooden building from one part of a lot to another and its permanent location at the latter. See also *N. Y. Fire Dep't v. Buhler*, 35 N. Y. 177, that a building originally used as a dwelling, but no longer so used, is within the prohibition of an act in regard to the erection of wooden or frame buildings within the fire limits of the city of New York, so as to prohibit its being raised under

a clause in the act permitting wooden dwelling houses to be raised under certain circumstances.

(*a*) *R. v. Woodland*, 1 T. R. 261; *R. v. Tillingham*, 1 B. & Ad. 180; *R. v. St. Sepulchre*, Id. 934.

(*b*) See *R. v. Astley*, 4 Doug. 389.

(*c*) *Masters v. Child*, 3 Salk. 66; *Tewkesbury v. Twynning*, 2 Bott. 3; comp. *R. v. Mattersey*, 4 B. & Ad. 211; *R. v. Halifax*, 2 B. & Ad. 211; and *R. v. Birmingham*, 8 B. & C. 29.

(*d*) *Much Waltham v. Peram*, 2 Salk. 474; *Westbury v. Coston*, Id. 532; *R. v. Great Salkeld*, 6 M. & S. 408.

(*e*) *R. v. Myott*, 32 L. J. M. C. 138; *R. v. Annandale*, 3 T. R. 382, 385.

(*f*) *R. v. Hughes, Dears. & B.* 188; 26 L. J. M. C. 133; *Massey v. Burton*, 2 H. & N. 597; 2 L. J. Ex. 101. [But a person may

§ 142. [Under an act which required, in suits upon certain causes of action, that the defendant should, within a certain time, file an affidavit of his defence, setting forth the nature and character of the same, and, in default thereof, allowing the court to enter judgment for plaintiff, it was held that the court had authority and was bound to enter judgment, not only where the defendant failed to file any affidavit of defence, but also in those cases, where the defence set forth by him, in his affidavit, was insufficient in law to bar a recovery ; otherwise, not only would the requirement to set forth the nature and character of the defence be a useless exaction, but the duty could, in every case, be evaded by a frivolous affidavit.<sup>160</sup> Again, a general railroad act passed in 1849 required a railroad company, locating its line on a public road, to reconstruct the same in another location. A survey made of a railroad, in 1871, took in a county road. The construction of the railroad was not begun until 1879. Meanwhile the road was taken into a city as a street. It was held that the liability of the railroad company, under the act of 1849, accrued at the date of its location by the survey in 1871, and was not changed by the subsequent delay of the company to complete its works.<sup>161</sup> Again, where an act granting certain privileges to a street passenger railway company, authorized its directors to declare dividends of its profits "at such time or times as they may deem expedient," but provided that the company should annually pay into the city treasury a tax of six percentum upon so much of any dividend declared as should exceed six percentum upon its capital stock, it was held, not only that the term "capital stock" related to the amount of capital stock actually paid in and not to the amount of the nominal authorized capital stock, but that the provision for the

become a stockholder in a building association for the mere purpose of obtaining a loan, and the fact that this alone was his purpose, constitutes no objection to his exercising all the rights of membership therein : *Mech., etc., Ass'n v. Wilcox*, 24 Conn. 147.]

<sup>160</sup> *West v. Simmons*, 2 Whart. (Pa.) 261 ; *Rising v. Patterson*, 5 Id. 316.

<sup>161</sup> *Pittsb., etc., Ry. Co. v. Com'th*, 101 Pa. St. 192. The fine imposed by the act, however, is a punishment for the disregard of the duty of reconstruction, not for taking the highway ; and hence the railroad company cannot be compelled in criminal proceedings either to remove its works, or to reconstruct the road, but only the fine can be inflicted : 1b.

annual payment of a tax upon "any dividend declared," etc., contemplated that the tax should be based upon the aggregate of dividends declared in any one year, and not upon any single dividend.<sup>162</sup>

§ 143. [It has been held, that,] where the payment of rates is made a matter of personal qualification, the Act would not be complied with if they were paid by another person on behalf of him who claims the qualification (*a*). [But, where the agency of the person who pays the tax, the payment of which by one is a prerequisite to qualify him as a voter, is recognized by the latter, he acquires the same right as if payment were made with his own hand.<sup>163</sup> And consequently, if such payment by another is subsequently ratified by the person for whom it is made, though, at the time, without his knowledge, it will be sufficient to confer upon him the right to vote.<sup>164</sup> Accordingly, it has been held in Pennsylvania, that the requirement of payment of taxes thirty days before the election, as a qualification for the right of voting, is satisfied by a payment thereof by another person, if appropriated, at the time of payment to the credit of the particular person by name, on whose account it is paid;<sup>165</sup> and the voter is not obliged to show that he assumed and acknowledged the payment by the agent, before the expiration of the time limited for payment of the tax.<sup>166</sup>]

§ 144. **Limits of the Rule.**—It is, however, essential not to confound what is actually or virtually prohibited or enjoined

<sup>162</sup> Philadelphia v. Pass. Ry. Co., 102 Pa. St. 190.

(*a*) R. v. Bridgnorth, 10 A. & E. 66; Durant v. Withers, L. R. 9 C. P. 257. But comp. R. v. Bridgewater, 3 T. R. 550; R. v. Weobley, 2 East, 68; Hughes v. Chatham, 5 M. & Gr. 54; R. v. S. Kilvington, 5 Q. B. 216. See Chinnery v. Evans, 11 H. L. 115, and Harlock v. Ashberry, 19 Ch. D. 539; 51 L. J. 394.

<sup>163</sup> Humphrey v. Kingman, 5 Met. (Mass.) 162.

<sup>164</sup> Contested Election Dauphin Co., 11 Phila. (Pa.) 645.

<sup>165</sup> Ibid.; Gillin v. Armstrong, 35 Leg. In. 282; Exp. Griffiths, 1 Kulp, 157; Glazier v. Merringer, 12

Lanc. B. 61.

<sup>166</sup> Contested Elect. Dauphin Co., supra. But where a constitutional provision required, that, in order to be entitled to vote, a person must have, within two years, paid a state or country tax, which had been assessed at least six months before the election, it was held that the assessment must have been upon him individually, and that the payment by him of a tax, not assessed against him until the day before the election, but laid upon the county more than six months before, was not sufficient: Catlin v. Smith, 2 Serg. & R. (Pa.) 267; and see Thompson v Ewing, 1 Brews. (Pa.) 102.

by the language, with what is really beyond the contemplation, though it may be within the policy, of the Act; for it is only to the former case that the principle under consideration applies, and not to cases where, however manifest the object of the Act may be, the language is not co-extensive with it (*a*). An Act of Parliament is always subject to evasion in this sense; for there is no obligation not to do what the Legislature has not really prohibited. Thus, a hiring for a few days less than a year, though avowedly for the purpose of preventing the servant from acquiring a settlement, was not regarded as any evasion of the Act, which gave a settlement on a year's service (*b*). Where a testator after devising a piece of land in a certain hamlet in fee simple, directed that if any person should, within twelve months after the testator's decease, at his or her own expense, purchase and give a suitable piece of land for almshouses, the trustees of the will should pay a sum of money to the charity so instituted, but so that no part should be laid out in the purchase of land, it was held that the bequest was valid, and did not fall within the Mortmain Act (*c*). And again, where a testator devised land to two persons absolutely, and signed an unattested paper expressing a desire, with which they were unacquainted until after his death, that it should be applied to charitable purposes, it was held that the devise was valid, and did not fall within the Mortmain Act; for there was no binding trust for charitable purposes (*d*).

It is not evading an Act to keep outside of it (*e*). Although, for instance, a beershop-keeper who is licensed to sell beer only to be drunk off the premises, evades the Act if he sells beer to be drunk on a bench which he provides for his customers close to his shop; the intention making it, substantially and in effect, a sale for consumption on the

(*a*) See *ex. gr.* *Etherington v. Wilson*, 1 Ch. D. 161; and *Pender v. Lushington*, 6 Ch. D. 70, 46 L. J. 317.

(*b*) *R. v. Little Coggleshall*, 6 M. & S. 264; *R. v. Mursley*, 1 T. R. 694.

(*c*) *Philpott v. St. George's Hospital*, 6 H. L. 338; *Dent v. Allcroft*, 30 Beav. 335, 31 L. J. 211; and see

*Edwards v. Hall*, 6 De G., M. & G. 84, 25 L. J. 82.

(*d*) *Wallgrave v. Tebbs*, 2 K. & J. 313, 25 L. J. 241.

(*e*) See *per* Lord Selborne in *Macbeth v. Ashley*, L. R. 2 Sc. App. 359. See *ex. gr.* *Shepherd v. Hall*, 3 Camp. 180; *King v. Low*, 3 C. & P. 620.

premises (a); a mere sale through a window, to a person who stood on the road outside, would not be an evasion, though the buyer drank the beer immediately on receiving it (b). An enactment which imposes a duty on legacies would not extend to a gift to take effect on the donor's death, made by a deed which contained a power of revoking the gift; though such a gift has all the essential incidents of a legacy (c). The Act which required that all bills of sale of personal chattels should be registered within twenty-one days from execution, on pain of being void against creditors, was held not to invalidate an arrangement by which a fresh bill of sale was to be given every twenty-one days, and none were to be registered until the debtor got into difficulties. Although such an arrangement was considered to be detrimental to the interests of the revenue, and to be calculated to defeat and delay creditors, and so was contrary to the general policy of the Act, since it left the debtor apparently the owner of property which he had transferred; it was held not to be prohibited by its language, and the last bill of sale, which was duly registered, was held valid against an execution creditor (d).

§ 145. [So, an act forbidding the purchase of land on account of the United States, except under a law authorizing such purchase, does not prohibit the acquisition by the United States, either directly or through the intervention of a trustee, of the title to land taken by way of security for a debt.<sup>167</sup> An act forbidding preferences in assignments for the benefit of creditors does not invalidate such preferences by way of judgments given for that purpose though intended to be, and actually, followed by an assignment;<sup>168</sup> nor by way of mortgage;<sup>169</sup> and where A and B, partners, holding a large amount of money belonging to C, made a declaration of trust of real and personal property belonging

(a) *Cross v. Watts*, 32 L. J. C. P. 73, 13 C. B. N. S. 239. See also *Brigden v. Heighes*, 1 Q. B. D. 330.

(b) *R. v. Schofield*, L. R. 3 Q. B. 8; *Bath v. White*, 3 C. P. D. 175.

(c) *Tompson v. Browne*, 3 M. & K. 32. [See, however, ante, § 140, as to construction of collateral inheritance tax act in Pennsylvania.]

(d) *Smale v. Burr*, L. R. 8 C. P. 64; Q. B. 17; comp. *Exp. Cohen*, L. R. 7 Ch. 20; *Exp. Stevens*, L. R. 20 Eq. 786; *Ramsden v. Lupton*, L. R. 9.

<sup>167</sup> *Neilson v. Lagow*, 12 How. 98.

<sup>168</sup> *Blakey's App.*, 7 Pa. St. 449.

<sup>169</sup> *Johnson's App.*, 103 Pa. St. 373.

to them in favor of C, and subsequently dissolved partnership, A retiring and naming B to receive the property and pay all firm and joint debts, and later B made a declaration of trust similar to the first, in which he and another were trustees, and an agreement with C, by which the latter was to receive, through the trustees, the property of B, subject to the incumbrances thereon, in payment of the amount due by A and B, and by B, whose debts were to be paid out of the proceeds of the property, which was to remain in the hands of the trustees, to whom all deeds and transfers of the real and personal property were made, it was held that this was not a general assignment for the benefit of creditors, but a sale with a security analogous to a mortgage for purchase-money.<sup>170</sup>

[Under a statute prohibiting a married woman from executing, without her husband's joinder, any conveyance of her real estate, or any instrument incumbering the same, it was held that she might nevertheless create a term of years in her lands without her husband's co-operation.<sup>171</sup> A statute forbidding a sale by a wife to her husband does not forbid a gift;<sup>172</sup> and one prohibiting a married woman from mortgaging or incumbering her real estate, acquired by devise, descent or gift, as security for her husband's debts, does not prevent her conveying her real estate, so acquired, in payment of such debts;<sup>173</sup> nor from mortgaging or incumbering such as was acquired by her by contract or purchase.<sup>174</sup>] In all such cases, it is, in truth, rather the particular transaction than the Statute which is the subject of construction. If it is found to be in substance within the Statute, it is not suffered to escape from the operation of the law by means of the disguise under which its real character is masked. [If,

<sup>170</sup> Fallon's App., 42 Pa. St. 235.

<sup>171</sup> Sullivan v. Barry, 46 N. J. L. 1. S. P., Percy v. Henley, 82 Ind. 129. And see Parent v. Callarand, 64 Ill. 97; Perkins v. Morse, 78 Me. 17; Stone v. Stone, 1 R. I. 425. But see Buchanan v. Hazzard, 95 Pa. St. 240; Innis v. Templeton, Id. 262; Miller v. Harbert, 6 Phila. (Pa.) 531.

<sup>172</sup> Cain v. Ligon, 71 Geo. 692.

<sup>173</sup> Kocher v. Christian, 88 Ind.

81.

<sup>174</sup> Frazer v. Clifford, 94 Ind. 482. See, however, as to the meaning of the word "gift" in an enabling statute, ante, § 103, Chapman v. Miller, 128 Mass. 269. And that a prohibition against becoming surety for another's debts does not incapacitate a married woman to mortgage her real estate for the same, see ante, § 124.

on the other hand, the substance of the transaction is found to be beyond the reach or outside the scope of the enactment, the resemblance to that which is prohibited, or even the fact that the latter may, in some sense, embrace the former, will not bring it within the statute.<sup>176</sup>]

§ 146. **Presumption against Permitting Abuse of Power.**—On the same general principle, enactments which confer powers are so construed as to meet all attempts to abuse them, either by exercising them in cases not intended by the statute, or by refusing to exercise them when the occasion for their exercise has arisen (*a*). Though the act done was ostensibly in execution of the statutory power, and within its letter, it would nevertheless be held not to come within the power, if done otherwise than honestly, and in the spirit of the enactment. For instance, the power given by modern Bankrupt Acts to a majority of creditors to make arrangements with their debtor, which are made by statute binding on the non-assenting minority, would not be validly exercised so as to have this binding effect, if the conduct of the majority were tainted with fraud; or even if from motives of benevolence, the majority had agreed to a composition disproportioned to the assets (*b*).

§ 147. **Judicial Discretion.**—Where, as in a multitude of Acts, something is left to be done according to the discretion of the authority on whom the power of doing it is conferred, the discretion must be exercised honestly and in the spirit of the statute, otherwise the act done would not fall within the statute. "According to his discretion," means it is said, according to the rules of reason and justice, not private opinion (*c*); according to law and not humor; it is to be, not arbitrary, vague and fanciful, but legal and regular (*d*); to be exercised not capriciously but on judicial

<sup>176</sup> As to when a construction permitting evasion will be required, see post, § 252.

(*a*) See *per* Turner, L. J., in *Bidolph v. St. George's Vestry*, 33 L. J. Ch. 411.

(*b*) *Exp. Cowen*, L. R. 2 Ch. 563; see *per* Lord Cairns, 570; *Exp. Russell*, L. R. 10 Ch. 255; *Re Page*, 2 Ch. D. 323; *Re Terrell*,

4 Ch. D. 293; *Exp. Aaronson*, 7 Ch. D. 713; *Exp. Ball*, 51 L. J. Ch. 911; *Exp. Russell*, 23 Ch. D. 778.

(*c*) *Rooke's Case*, 5 Rep. 100a; *Keighley's Case*, 10 Rep. 140a; *Lee v. Bude R. Co.*, L. R. 6 C. P. 576, *per* Willes, J.

(*d*) *Per* Lord Mansfield in *R. v. Wilkes*, 4 Burr. 2839.



grounds and for substantial reasons (a). ["Appeals to the discretion of judges in the exercise of their jurisdiction," says a late eminent judge in Pennsylvania, "are sometimes made under an apparent impression that they are at liberty to admit the influence of those appeals as fully as the Legislature or the Governor of the State. But in general judges have no discretionary authority beyond that connected with the mere conduct of the business of their tribunal. And wherever such discretion of authority is conferred upon them in reference to subjects outside of their peculiar duties, it is always presumed by the Legislature that it will be exercised in accordance with judicial usages and upon uniform and established rules. . . Acting upon settled rules, the bar, suitors and community can depend upon steady and permanent action. . . In the administration of justice, there is nothing that properly could be termed discretion. Mere discretionary power has always been mere despotism. In all subjects, some established and recognized principles control the courts. . . Any other course of action would destroy the very characteristics of a judicial tribunal—it would leave each successive question to be settled by impulse, prejudice and caprice—and would in one word leave the community without law."<sup>176</sup> In another case it was said: "The act of assembly leaves it to the discretion of the court, whether or not to admit an alteration of the pleading; I mean their legal discretion, founded on good reason."<sup>177</sup> So, where a statute authorizes a court, in certain cases, to render such judgment as substantial justice shall require, it means substantial legal justice, ascertained by fixed rules, and not by the varying notions of abstract equity entertained by each individual.<sup>178</sup> But it was held, in the case of a special act permitting a party to file a bill as in chancery, and requiring the court to decide the controversy "on the principles of justice and good faith," that the court was at liberty to adjust the matter, regardless

(a) *Per* Jessel, M. R., in *re* Taylor, 4 Ch. D. 160; and *per* Lord Blackburn in *Doherty v. Allman*, 3 App. 728.

<sup>176</sup> *Re* Report of County Audi-

tors, 1 Woodw. (Pa.) 270, 271-3, *per* Woodward, P. J.

<sup>177</sup> *Lyons v. Miller*, 4 Serg. & R. (Pa.) 279, 281, *per* Tilghman, C. J.

<sup>178</sup> *Stevens v. Ross*, 1 Cal. 94.

of technical rules, upon principles as liberal as the Legislature itself might have adopted.<sup>179</sup>

§ 148. **Limits of Discretion Conferred on Officers.**—[Where a discretion is thus conferred upon an officer,] it must be exercised within the limits to which an honest man competent to the discharge of his office ought to confine himself (*a*); that is, within the limits and for the objects intended by the legislature. Thus, it was long ago settled that the power given by the 43 Eliz. to the overseer of parishes to raise a poor rate by taxation of the parishioners in such competent sums as they thought fit, did not authorize an arbitrary rate on each parishioner, but required that the rates should be equal and proportionate to the means of the contributors (*b*). So, the Highway Act, 5 & 6 Will. 4, c. 50, which provided that if any complaint was made against the road surveyor's accounts, the justices at special highway sessions should hear it, and "make such order thereon as to them should seem "meet," would not authorize them to allow illegal expenses, such as a charge for the use of the surveyor's horses, contrary to section 46, which are expressly forbidden to be incurred at all (*c*). Under an enactment that no license should be refused by justices except on one or more of four specified grounds, it was held that justices, in refusing, were bound to state on which of the grounds they based their refusal, as otherwise they might, in abuse of their powers, refuse on other grounds than those to which they were limited (*d*).

[And it must be exercised in a reasonable manner.<sup>180</sup> Hence it would seem that statutes conferring upon certain officers or municipal boards the power of removing subordinate officers for cause, require, as a condition precedent to the exercise of the power, notice and hearing to be given to the delinquent.<sup>181</sup>]

<sup>179</sup> *Seely v. Ohio*, 11 Ohio, 501; 12 Id. 496.

(*a*) *Per* Lord Kenyon in *Wilson v. Rastall*, 4 T. R. 757; *R. v. Audley*, Salk. 526; *R. v. Wavell*, Doug. 115.

(*b*) *Early's Case*, Bulstr. 354; *Marshall v. Pitman*, 9 Bing. 601. See *Jones v. Mersey Docks*, 35 L. J. M. C. 1; 11 H. L. 443; and

*Whitchurch v. Fulham Board*, L. R. 1 Q. B. 233, 35 L. J. 145.

(*c*) *Barton v. Pigott*, L. R. 10 Q. B. 86, 44 L. J. M. C. 5.

(*d*) 32 & 33 Vict. c. 27, s. 8; *R. v. Sykes*, 1 Q. B. D. 52. *Exp. Smith*, 3 Q. B. D. 374.

<sup>180</sup> *Lash v. Von Neida*, 109 Pa. St. 207.

<sup>181</sup> See *Ham v. Boston Board of*

§ 149. **Discretion to be Exercised in Individual Cases.**—Where the discretion has been settled by practice, this should not be departed from without strong reason (a). [Hence, although a statute left it to the discretion of the court whether or not to admit an alteration of the pleadings, it was held, that, a defendant having passed over his time for putting in a plea of plaintiff's coverture pending the action (a matter which should, according to established rules of practice, be pleaded *puis darrein continuance*), the court properly rejected a motion for permission to make the plea during trial.<sup>182</sup> And upon similar grounds an application for the amendment of a declaration in *assumpsit* for goods sold and delivered, by the addition of counts for money lent and work and labor done, was denied, whilst the addition of counts for money had and received and upon an account stated was allowed.<sup>183</sup>] But if a statute confers a power, with the intention that its exercise shall be subject to the discretion in every particular case, an exercise of it in the fetters of self-imposed rules, purporting to bind in all cases, would not be within the Act. Thus, where an Act gave the Court of Quarter Sessions power, if it thought fit, to give costs in every poor law appeal, it would be bound to exercise a fair and honest discretion in each case, and would not be entitled to govern itself by a general resolution, or rule of practice, to give nominal costs in all cases (b); for this would be in effect to repeal the provision of the Act. So, a licensing Act, which empowered justices to grant licenses to innkeepers and others, to sell liquors, as in the exercise of their discretion they deemed proper, would not justify a general resolution to refuse licenses to all persons who did not consent to take out an excise license for the sale of spirits, in addition to the license for the sale of beer (c). [This sub-

Police, 142 Mass. 90; and see *Andrews v. King*, 77 Me. 224. Ante, § 51. *Comp. Eckloff v. Distr. of Columbia*, 4 Mackey (D. C.) 572.

(a) 2 Inst. 298. See *R. v. Chapman*, 8 C. & P. 558. [See also *Re Report of Co. Auditors*, 1 Woodw. (Pa.) 270.]

<sup>182</sup> *Wilson v. Hamilton*, 4 Serg. & R. (Pa.) 238.

<sup>183</sup> *Triebel v. Deysher*, 2 Woodw. (Pa.) 15.

(b) *R. v. Merioneth*, 6 Q. B. 163; *R. v. Glamorganshire*, 1 L. M. & P. 336; *comp. Freeman v. Read*, 9 C. B. N. S. 301, 30 L. J. M. C. 123.

(c) *R. v. Sylvester*, 2 B. & S. 322, 31 L. J. M. C. 93; *R. v. Wall*, 3 Com. L. R. 100.

ject has received elaborate examination at the hands of the Supreme Court of Pennsylvania, in a case decided in 1872. It arose under an act conferring upon the board of licensers of the city of Erie "the same power and authority to grant licenses in the said city of Erie as the court of Quarter Sessions now has." The various acts under which that court exercised its jurisdiction in the granting of licenses required that the court should grant no license when the public house for which it was asked was unnecessary or insufficient in the point of accommodation, or where the person by whom it was sought for was unfit, and directed that it should be lawful for the court to hear petitions, in addition to that of the applicant, for, and remonstrances against the application, and in *all cases* to refuse the same, whenever, in its opinion, having due regard to the number and character of the petitioners for and against the application, such license was not necessary for the accommodation of the public, etc., and, upon sufficient cause shown, to revoke any license granted. "No subject," says the Court, "has been productive of more difference of opinion and practice than this, in the different judicial districts of the state; some judges holding it to be obligatory on the court to grant every license where the applicant has brought himself within the provisions of the law as to the terms of his application, and others holding that they are not bound to grant any license whatever. Clearly neither opinion is right; the discretion which the court exercises being a sound discretion upon the circumstances of each case as it is presented to the court, and not a general opinion upon the propriety or impropriety of granting licenses. Whether any or all licenses should be granted is a legislative, not a judicial question. Courts sit to administer the law fairly, as it is given to them, and not to make or repeal it. The law of the land has determined that licenses shall exist, and has imposed upon the court the duty of ascertaining the proper instances in which the license shall be granted, and therefore has given it to the court to decide upon each case as it arises in due course of law. The act of deciding is judicial, and not arbitrary or wilful. The discretion vested in the court is, therefore, a

judicial discretion ; and to be a rightful judgment it must be exercised in the particular case and upon the facts and circumstances before the court, after they have been heard and duly considered ; in other words, to be exercised upon the merits of each case, according to the rule given by the Act of Assembly. To say that I will grant no license to any one, or that I will grant it to every one, is not to decide judicially on the merits of the case, but to determine beforehand without a hearing, or else to disregard what has been heard. It is to determine, not according to law, but outside of law, and it is not a legal judgment, but the exercise of an arbitrary will."<sup>184</sup>

§ 150. [Upon a similar question, where an act,] after fixing the hours within which intoxicating liquors might be sold, authorized the licensing justices to alter the hours in any particular locality, within the district, requiring other hours ; it was held that they had no right to alter the time in every case by virtue of a general resolution to which they had come (a). And though their resolution was limited to a portion of the locality, yet as this portion comprised every licensed house of the whole district, the limitation was regarded as a mere attempt to evade the Act. The statute required them to decide, in the honest and bona fide exercise of their judgment, what particular localities required other hours for opening and closing, than those specified ; and they were bound to satisfy themselves that the special circumstances of the particular locality, which they took out of the general rule laid down by Parliament, required that the exception should be made (b). The statute had laid down a general rule, and permitted an exception ; but here the exception had swallowed up the rule ; and that which might fairly have been an exercise of discretion, became no exercise of the kind of discretion meant by the Act (c).

<sup>184</sup> *Schlaudecker v. Marshall*, 72 Pa. St. 200, 206-7, per Agnew, J.

(a) *Macbeth v. Ashley*, L. R. 2 Sc. App. 352.

(b) See the judgment of Lord Selborne, Id. 359.

(c) *Per* Lord Cairns, L. R. 2 Sc. App. 357. [See *Addenda*.]

## CHAPTER VI.

### PRESUMPTIONS AS TO JURISDICTIONS, GOVERNMENT, EXCESS OF LEGISLATIVE FUNCTIONS AND POWERS, VIOLATION OF INTERNATIONAL LAW, TREATIES AND CONSTITUTION.

- § 151. Presumption against Ousting Jurisdictions. Superior Courts.
- § 152. Justices of the Peace and Inferior Courts.
- § 153. Ouster of Jurisdiction by Implication.
- § 154. Exclusive Statutory Jurisdictions and Remedies.
- § 155. Presumption against Creating New Jurisdictions and Remedies.
- § 156. Effect to be given to Necessary Implication.
- § 157. New Jurisdictions and Remedies not Extended by Construction.
- § 158. Summary Jurisdictions.
- § 159. United States Courts.
- § 160. Special Jurisdictions.
- § 161. Presumption against Intent to Affect Government. Eminent Domain.
- § 163. Statutes Imposing Taxation.
- § 164. Statutes of Limitations.
- § 165. Municipalities.
- § 166. When Government is Included.
- § 169. Statutes presumed to have no extra-territorial force.
- § 170. Exceptions.
- § 171. Presumption against Intent to Exceed Legislative Functions and Powers. Natural Laws.
- § 172. Presumption against Invasion of Judicial Functions.
- § 173. Presumption against Intent to Bind Future Legislatures.
- § 174. Presumption against Violation of International Law. Treaties.
- § 176. Rights, etc., of Foreigners. Remedies.
- § 178. Presumption against Intent to Violate Constitution.
- § 179. Restriction of Language to Conform with Constitution.
- § 180. Limits of Rule.
- § 181. Statute and Constitution to be Construed Together.

§ 151. **Presumption against Ousting Jurisdictions. Superior Courts.**—It is, perhaps, on the general presumption against an intention to disturb the established state of the law, or

to interfere with the vested rights of the subject (*a*), that the strong leaning now rests against construing a statute as ousting or restricting the jurisdiction of the Superior Courts; although it may owe its origin to the pecuniary interests of the Judges in former times, when their emoluments depended mainly on fees (*b*). It is supposed that the legislature would not make so important an innovation, without a very explicit expression of its intention. It would not be inferred, for instance, from the grant of a jurisdiction to a new tribunal over certain cases, that the legislature intended to deprive the Superior Court of the jurisdiction which it already possessed over the same cases. Thus, an Act which provided that if any question arose upon taking a distress, it should be determined by a commissioner of taxes, would not thereby take away the jurisdiction of the Superior Court to try an action for an illegal distress (*c*). Nor would that Court be ousted of its preventive jurisdiction to stop by injunction the misapplication of poor rates, by the power given to the poor law commissioners by statute to determine the propriety of all such expenditure (*d*). It did not follow in either case, that because authority was given to the commissioners, it was taken away from the Court. [So, a grant to the councils of a municipality, of power to open streets, does not operate as a repeal of that power conferred by former acts upon the Courts of Quarter Sessions.<sup>1</sup> An act which extended the equity jurisdiction of the Supreme Court of Pennsylvania and of the Courts of Common Pleas in Philadelphia County to causes based on accounts, etc., was

(*a*) See *Jacobs v. Brett*, L. R. 20 Eq. 1. [See, also, *Overseers v. Smith*, 2 Serg. & R. (Pa.) 363, 365, 367.]

(*b*) *Per* Lord Campbell in *Scott v. Avery*, 5 H. L. 811, 25 L. J. Ex. 308. So in construing contracts, *Scott v. Avery*; *Tredwen v. Holman*, 1 H. & C. 72, 31 L. J. 398; *Edwards v. Aberayon Insurance Co.*, 1 Q. B. D. 563; *Dawson v. Fitzgerald*, Ex. D. 257.

(*c*) 43 Geo. 3, c. 99; *Shaftesbury v. Russell*, 1 B. & C. 666; see, also, *Rochdale Canal Co. v. King*, 14 Q.

B. 122.

(*d*) *Atty.-Genl. v. Southampton*, 17 Sim. 6. See *Birley v. Chorlton*, 3 Beav. 499; *Smith v. Whitmore*, 1 Hem. & M. 576, 2 De Gex, J. & S. 297, 33 L. J. 713. [See *People v. Vanderbilt*, 24 How. Pr. (N. Y.) 301, where it was held that a statute conferring power to remove an obstruction when erected, does not take away the right of the courts to prohibit the erection thereof before completed, if it is unlawful, apart from the statute.]

<sup>1</sup> *Re* Twenty-eighth Str., 102 Pa. St. 140.

held not repealed by a later act giving the courts of Common Pleas throughout the state chancery jurisdiction in settling partnership accounts, etc.; nor the latter by an act giving jurisdiction to all the courts of Common Pleas of several classes of cases, including accounts which cannot be settled by actions of account render.<sup>2</sup> Statutes giving jurisdiction to courts of law previously within the jurisdiction of courts of equity, do not, ordinarily, where the language of the statute is affirmative and does not otherwise provide, destroy the jurisdiction of the latter in the premises;<sup>3</sup> the principle being that an act affirmatively giving jurisdiction to one court is not to be understood as ousting the jurisdiction previously existing in another.<sup>4</sup> It may be observed that this principle<sup>5</sup> applies equally to constitutional provisions affecting the jurisdiction of, *e. g.*, the Supreme Court of the State,<sup>6</sup> whose jurisdiction, it is said, can be taken away only by express words or irresistible implication,<sup>7</sup> whether by statute or by the constitution,<sup>8</sup> and whether that jurisdiction be original or appellate.<sup>9</sup> As a result of the strict construction flowing from the presumption against ousting an established jurisdiction, it follows that an act giving an exclusive in place of a former concurrent jurisdiction is not to be construed retrospectively, if its language can fairly bear another interpretation.<sup>10</sup>

§ 152. **Justices of the Peace and Inferior Courts.**—Acts which give justices and other inferior tribunals jurisdiction in certain cases, are understood, in general, when silent on the subject, as not affecting the power of control and supervision which the Superior Court exercises over the proceedings of

<sup>2</sup> Dick's App., 106 Pa. St. 589. The statutes were, respectively, Act 13 June 1840, § 39; Act 13 Oct. 1840, § 19; Act 14 Feb. 1857.

<sup>3</sup> Crawford v. Childress, 1 Ala. 482; Wesley Church v. Moore, 10 Pa. St. 273; Raudebaugh v. Shelley, 6 Ohio St. 307; Barnawell v. Threadgill, 5 Ired. Eq. (N. C.) 86; Phipps v. Kelly, 12 Ore. 213; McKoin v. Cooley, 3 Humph. (Tenn.) 559. And see People v. Vanderbilt, 24 How. Pr. (N. Y.) 301; Gibbs v. Beaufort, 20 S. C. 213. Also post, § 218.

<sup>4</sup> Barnawell v. Threadgill, *supra*.

<sup>5</sup> For a recognition of which see Custer Co. v. Yellowstone Co., 6 Mont. 39.

<sup>6</sup> See post, § 522, Com'th v. Balph, 111 Pa. St. 365.

<sup>7</sup> Overseers v. Smith, 2 Serg. & R. (Pa.) 363, 365.

<sup>8</sup> See cases in notes 6 and 7.

<sup>9</sup> *Ibid*.

<sup>10</sup> State v. Littlefield, 93 N. C. 614; and see where an exclusive jurisdiction is made concurrent, to the same effect: Mc Michael v. Skilton, 13 Pa. St. 215.



such tribunals. [Thus where an act authorized the sale of the property of a married man deserting his wife and leaving her a charge upon the public, upon the order of two justices, confirmed by the Court of Quarter Sessions, it was held that the jurisdiction of the Supreme Court to review the proceedings upon certiorari (the proceeding being statutory, and therefore properly reviewable by certiorari,<sup>11</sup> unless the jurisdiction to issue the writ was ousted by the act,) was not taken away, either expressly or by irresistible implication, although, as to other matters covered by the act, other sections of the same made the decisions of the Quarter Sessions final.<sup>12</sup> Acts giving such inferior jurisdictions] are even strictly construed when their language is doubtful;<sup>13</sup> [and this is especially so, where the jurisdiction conferred is civil.<sup>14</sup>] Enactments to the effect that "no Court shall intermeddle" in the cases (a), or that the case shall be "heard and finally determined" below (b), would not be construed as prohibiting such interference;<sup>15</sup> and enactments which expressly provide that such proceedings shall not be removed by certiorari to the Superior Court have no

<sup>11</sup> Parks v. Watts, 112 Pa. St. 4.

<sup>12</sup> Overseers v. Smith, 2 Serg. & R. 363.

<sup>13</sup> Bigelow v. Stearns, 19 Johns. (N. Y.) 39; Davis v. Marshall, 14 Barb. (N. Y.) 96; Firmstone v. Mack, 49 Pa. St. 387; Campan v. Fairbanks, 1 Mich. 151; Bargis v. State, 4 Ind. 126; Wakefield v. State, 5 Id. 195; O'Brien v. State, 12 Ind. 369; Walker v. Wynne, 3 Yerg. (Tenn.) 62; and see Hersom's Case, 39 Me. 476; also Bish., Wr. L., § 197, that statutes creating limited jurisdictions should be strictly construed, cit. State v. Anderson, 2 Tenn. (3 Overt.) 6; Shawnee v. Carter, 2 Kan. 115; Russell v. Wheeler, Hempst. 3; but as to procedure, see same case, ante, § 108, note.

<sup>14</sup> All civil jurisdiction in justices of the peace is essentially statutory; it has no common law root: see Ellis v. White, 25 Ala. 540; Firmstone v. Mack, 49 Pa. St. 387, 392; Willey v. Strickland, 8 Ind. 453. At common law, justices of the peace were only conservators of the peace: *Id.* In Searcy v.

Tillman, 75 Ga. 504, it was held that a note for \$100 and ten per cent. attorney fee for collection was beyond the jurisdiction of a justice.

(a) R. v. Moseley, 2 Burr. 1011.

(b) R. v. Plowright, 2 Mod. 95; 2 Hawk. P. C. c. 27, s. 23. See Jacobs v. Brett, L. R. 20 Eq. 1; Chambers v. Green, *Id.* 552; Hawes v. Paveley, 1 C. P. D. 418; Bridge v. Branch, *Id.* 633; Oram v. Brearey, 2 Ex. D. 346. [But see Snell v. Bridgewater, etc., Co., 24 Pick. (Mass.) 296, where an act declaring a judgment entered in a certain proceeding to be "final" was held to preclude the right of appeal.]

<sup>15</sup> Nor does the grant of "exclusive jurisdiction" over certain offences, to a police court, exclude the authority of justices of the peace to receive complaints and issue warrants returnable before that court against persons charged with those offences: Com'th v. O'Connell, 8 Gray (Mass.) 464; and see Exp. Bishop, 4 Mo. 219.

application when the lower tribunal has overstepped the limits of its jurisdiction in making the order (a), or is not duly constituted (b), for the prohibition obviously applied only to cases which have been entrusted to the lower jurisdiction; or where the party who obtained the order, obtained it by fraud (c). [In conformity with this rule was the construction of an act relating to the jurisdiction of justices of the peace, and authorizing the issuing of writs of certiorari by courts of common pleas to such justices, but only within a certain time, and with a proviso that the judgment of the common pleas should be final, and that no writ of error to the Supreme Court should issue thereon; another section forbidding the issuance of any writ of certiorari out of the Supreme Court to any justice of the peace in any civil suit or action. It was held that all these limitations must be understood as extending only to civil actions, because in those only was jurisdiction given by the precedent parts of the act; only to actions which were essentially civil actions, and not to actions for the recovery of penalties by proceedings assimilated to those for the enforcement of civil liabilities; and only to those civil proceedings which were instituted under the provisions of that act itself, and not to proceedings instituted before justices under jurisdiction conferred by other and later acts of assembly, or by municipal ordinances, notwithstanding these made the jurisdiction exercisable "in the same manner" as that act directed.<sup>16</sup>]

(a) *R. v. Derbyshire*, 2 Ken. 299; *R. v. Somersetshire*, 2 B. & C. 816; *R. v. St. Albans*, 22 L. J. M. C. 142; *R. v. Wood*, 5 E. & B. 49; *R. v. S. Wales R. Co.*, 13 Q. B. 988; *Penny v. S. E. R. Co.*, 7 E. & B. 660, 26 L. J. Q. B. 225; *R. v. Hyde*, 7 E. & B. 859, 21 L. J. M. C. 94; *Exp. Bradlaugh*, 9 Q. B. D. 509; 47 L. J. 105.

(b) *R. v. Cheltenham*, 1 Q. B. 467.

(c) *R. v. Cambridge*, 4 A. & E. 121, *per* Lord Denman; *R. v. Gilliard*, 12 Q. B. 527; *Colonial Bank v. Willan*, L. R. 5 P. C. 417. [A certiorari does not lie from a superior to an inferior court to remove a cause merely by reason of a defect of jurisdiction: *Fowler v. Lindsey*, 3 Dall. (Pa.) 411. But

where the statutory form of an order or proceeding has not been properly pursued, by reason of which the order or proceeding is void, it may yet be treated as voidable, and a certiorari taken to quash it: *Fitch v. Comm'rs*, 22 Wend. (N. Y.) 132. And it was held, in *Re Bruni*, 1 Barb. (N. Y.) 187, that the Supreme Court of the State had power to review, upon certiorari, the proceedings of a magistrate, who, while professing to exercise a jurisdiction conferred by act of Congress, had acted in the name of the people of the State, by writs of the people directed to State officers.]

<sup>16</sup> *Com'th v. Betts*, 76 Pa. St. 465

§ 153. **Ouster of Jurisdiction by Implication.**—The saying has been attributed to Lord Mansfield that nothing but express words can take away the jurisdiction of the Superior Courts (a); but it may certainly be taken away also by implication (b). Thus a provision that if any dispute arises between a society and any of its members it shall be lawful to refer it to arbitration, ousts the jurisdiction of the Courts over such disputes (c). It is obvious that the provision, from its nature, would be superfluous and useless, if it did not receive a construction which made it compulsory, and not optional, to proceed by arbitration. [So, where a statute conferred upon the Orphan's Court, charged exclusively with the settlement of decedent's estates, jurisdiction in partition of decedent's real estate among persons who took by descent from them, it was held that its jurisdiction in such cases was exclusive and ousted the jurisdiction of the courts of common pleas."'] Where an Act imposed penalties and took away the certiorari; and a subsequent one, after increasing the penalties and extending the restriction of the first, provided that all "the powers, provisions, exemptions, matters and things" contained in the earlier should, except as they were varied, be as effectual for carrying out the latter

where the authorities are collated and examined. And see *Caughy v. Pittsburgh*, 12 Serg. & R. (Pa.) 53; and *Bauer v. Augeny*, 100 Pa. St. 429, where the right of the Supreme Court to issue certiorari to a justice in a case not falling within the prohibition of the act above referred to, Act 20 March 1810, was exercised unaffected by the Constitution of 1874. On the other hand, the provision in the act of 1810 (under which a justice's jurisdiction was limited to \$100) that the judgment of the common pleas on certiorari should be final, was not repealed by the act of 1879 enlarging his civil jurisdiction to \$300: Pa., etc., Co. v. *Stoughton*, 106 Pa. St. 458.

(a) *R. v. Abbot*, Doug. 553.

(b) *Per Ashurst, J.*, in *Cates v. Knight*, 3 T. R. 442, and *Shipman v. Henbest*, 4 T. R. 116; *per Jessel, M. R.* in *Jacobs v. Brett*, L. R. 20 Eq. 6; *per Pollock, B.*, in *Oram v.*

*Brearey*, 2 Ex. D. 348. [See also, to this effect: *New London, etc., R. R. Co. v. R. R. Co.*, 102 Mass. 386, 389; *Overseers v. Smith*, 2 Serg. & R. (Pa.) 363; *Re Twenty-eighth St.*, 102 Pa. St. 140, 149; *Com'th v. Balph*, 111 Id. 365; *Graham v. O'Fallon*, 3 Mo. 507.]

(c) *Crisp v. Bunbury*, 8 Bing. 394; and see *Marshall v. Nichols*, 18 Q. B. 882, 21 L. J. Q. B. 343; *Boyfield v. Porter*, 13 East, 200; *Exp. Payne*, 5 D. & L. 679; *Armitage v. Walker*, 2 K. & J. 211; *Reeves v. White*, 17 Q. B. 995, 21 L. J. 170; *Wright v. Monarch Investment Soc.*, 5 Ch. D. 726; *Huckle v. Wilson*, 2 C. P. D. 410. *Comp. Rochdale Canal v. King*, 14 Q. B. 122.

<sup>17</sup> *McMichael v. Skilton*, 13 Pa. St. 215; *Clawges v. Clawges*, 2 Miles (Pa.) 34. (This rule was, however, changed by the act of 21 April, 1846, P. L. 426.) And see *Graham v. O'Fallon*, 3 Mo. 507.

Act as if re-enacted in it; it was held that the clause which took away the certiorari was incorporated in the new Act, and consequently that the jurisdiction of the Superior Courts was ousted (*a*). [And in a later case it has been held that an act providing for the summary punishment of a seaman who neglects, without reasonable cause, to join his ship, by implication takes away any other previously existing remedy against the seaman for such breach of his contract.<sup>17</sup> Similarly, where a statute imposed a fine upon any person participating in the loaning of public money, to double the amount embezzled, this remedy was held exclusive of a civil action for the same offense.<sup>18</sup>]

§ 154. **Exclusive Statutory Jurisdictions and Remedies.**—Where, indeed, a new duty or cause of action is created by Statute, and a special jurisdiction out of the course of the common law—[a particular proceeding not theretofore existing to enforce the duty imposed or to vindicate the right conferred,] is prescribed, there is no ouster of the jurisdiction of the ordinary courts, for they never had any [and it follows that the statutory remedy, and no other, must be strictly pursued.<sup>19</sup> So, when a statute creates a right and provides a specific mode for redress of injuries caused by its exercise,<sup>20</sup>

(*a*) *R. v. Fell*, 1 B. & Ad. 380.

<sup>17</sup> *Great Northern, etc., Co. v. Edgehill*, L. R. 11 Q. B. D. 225.

<sup>18</sup> *Hancock Co. v. Bank*, 32 Ohio St. 194. Compare, however, *Salem Turnp., etc., Co. v. Hayes*, 5 Cush. (Mass.) 458, where the provision of a charter of a turnpike company, that any person guilty of certain injuries to the road should pay a certain fine, was held not to take away any common law remedies for such injury, partly upon the ground, that, in many cases, the fine would be a wholly inadequate compensation.

<sup>20</sup> *Vallance v. Falle*, L. R. 13 Q. B. D. 109; *Bailey v. Bailey*, Id. 859; *Almy v. Harris*, 5 Johns. (N. Y.) 175; *Renwick v. Morris*, 7 Hill (N. Y.) 575; *Smith v. Lockwood*, 13 Barb. (N. Y.) 209; *Dudley v. Mayhew*, 8 N. Y. 9; *Hinsdale v. Larned*, 16 Mass. 65; *Boston v. Shaw*, 1 Met. (Mass.) 130; *Crosby v. Bennett*, 7 Id. 17; *Ham v. Steam-*

*boat*, 2 Iowa 460; *McKenzie v. Gibson*, 73 Ala. 204; *Camden v. Allen*, 26 N. J. L. 398; *McKinney v. Nav. Co.*, 14 Pa. St. 65; *Moyer v. Kirby*, 14 Serg. & R. (Pa.) 165; *Turnp. Co. v. Brown*, 2 Pen. & W. (Pa.) 463; *Turnp. Co. v. Martin*, 12 Pa. St. 362; *Philadelphia v. Wright*, 100 Id. 235; *Beltzhoover v. Gollings*, 101 Id. 293; *White v. McKeesport*, Id. 394; *People v. Craycroft*, 2 Cal. 243; *Thurston v. Prentiss*, 1 Mich. 193; *State v. Corwin*, 4 Mo. 609; *Lang v. Scott*, 1 Blackf. (Ind.) 405; *McCormack v. R.R. Co.*, 9 Ind. 283; *State v. Loftin*, 2 Dev. & B. (N. C.) 31; *Bailey v. Bryan*, 3 Jones (N. C.) 357; *Pruden v. Grant Co.*, 12 Ore. 308.

<sup>21</sup> *Sudbury Meadows v. Middlesex Canal*, 23 Pick. (Mass.) 86; *Dodge v. Essex*, 3 Met. (Mass.) 380; *Spangler's App.*, 64 Pa. St. 387; *Henniker v. R. R. Co.*, 29 N. H. 147; *Spring v. Russell*, 7 Me. 273 but see *Fryeburg Canal v. Frye*, 5 Id.

or for the neglect of a duty coupled with the grant of the privilege," or gives a right of action for an injury not previously actionable by plaintiff." And where an act provides a remedy against the state, never liable to a common law action, that remedy is, of course, exclusive of all others." But where the Act directs that a new offence which it creates shall be tried by an inferior Court according to the course of the common law, the inferior Court tries it as a common law Court, subject to all the consequences of common law proceedings, and subject therefore to removal by writs of error, habeas corpus, and certiorari; and the Superior Court would not be ousted of this jurisdiction (a).

§ 155. **Presumption against Creating New Jurisdictions and Remedies.**—As it is presumed that the Legislature would not effect a measure of so much importance as the ouster or restriction of the jurisdiction of the Superior Court without an explicit expression of its intention, so it is equally improbable that it would create a new [especially a new and

38. Such is the case of a right of action given by statute to property owners for injuries sustained by them from the exercise by corporations of the right of eminent domain delegated to them; the proceedings prescribed by the statute for the enforcement of the claim being exclusive of any other remedy: *Hull v. R.R. Co.*, 21 Neb. 371 and cases before cited. But the restriction to such statutory remedy applies only where the corporation proceeds, in the exercise of its rights, in accordance with the statutory provisions prescribing the manner of their exercise. If it deviates from, or ignores, *e. g.*, the statutory method of appropriation of land, which alone can make its possession rightful, it is, like any one else in such circumstances, a mere trespasser, liable to the usual common law remedies by the owner: *ibid.*, cit. *Omaha, etc., R. R. Co., v. Menk*, 4 Neb. 20, 24; *Blaisdell v. Winthrop*, 118 Mass. 138; *Ewing v. St. Louis*, 5 Wall. 413; so that the owner may enjoin its entry: *Omaha, etc., R. R. Co., v. Menk*, *supra*; *Ray v. R. R. Co.*, 4 Neb. 439; *Cameron v. Supervis-*

*ors*, 47 Miss. 264; *Paris v. Mason*, 37 Tex. 447; *Floyd v. Turner*, 23 Id. 292; *Pierpoint v. Harrisville*, 9 W. Va. 215; or may bring ejectment: *Hull v. R. R. Co.*, *supra*, cit. *Chic., etc., R. R. Co. v. Smith*, 78 Ill. 96; *Smith v. R. R. Co.*, 67 Id. 191; *Chic., etc., R. R. Co. v. Knox College*, 34 Id. 195; or trespass: see *Bethlehem, etc., Co. v. Yoder*, 112 Pa. St. 136; *Justice v. R. R. Co.*, 87 Id. 28.

<sup>22</sup> *Bailey v. Bailey*, L. R. 13 Q. B. D. 859; *Bassett v. Carleton*, 32 Me. 553; *Pittsb., etc., Ry Co. v. Com'th*, 101 Pa. St. 192.

<sup>23</sup> So, in a statutory action by a widow against a railroad company for the death of her husband, she must bring herself within the statutory requirements necessary to confer the right of action, and they must appear in her petition or complaint: *Harker v. Han. & St. Jos. Ry Co.*, 91 Mo. 86.

<sup>24</sup> *McKinney v. Nav. Co.*, 14 Pa. St. 65; comp. post, § 168. See as to strict pursuance of statutory remedies and rights, post, §§ 434, 435, 465.

(a) *Per Lord Mansfield in Hartley v. Hooker*, Cowp. 524.

exclusive"] jurisdiction with less explicitness; and therefore a construction which would impliedly have this effect is to be avoided (*a*). It has been said that an inferior Court is not to be construed into a jurisdiction (*b*); [that, *e. g.*, the jurisdiction of a magistrate can never be created by implication from the phraseology of a statute assuming it to extend to a particular case.<sup>25</sup>] An Act, for instance, which in providing that compensation should be made to all who sustained damage in carrying out certain works, enacted that "in case of dispute as to the amount," it should be settled by arbitration, would be confined strictly to cases where the amount only was in dispute, but would not authorize a reference to arbitration, where the liability to make any compensation was in dispute (*c*). [So, under an act authorizing compulsory references in cases requiring "the examination of a long account," it was held that the mere fact that entries in books of account must be put in evidence and examined, upon the trial of a case, did not necessarily make the case one that could be so referred;<sup>27</sup> but the case must be one in which the account is directly involved.<sup>28</sup> It is even said, that a failure of justice is not a sufficient reason for construing an

<sup>25</sup> *Custer Co. v. Yellowstone Co.*, 6 Mont. 39.

(*a*) *Warwick v. White*, Bunb. 106; *Kite and Lane's Case*, 1 B. & C. 107, *per* Lord Tenterden; *R. v. Baines*, 2 Lord Raym. 1269, cited by Lord Denman, in *Fletcher v. Calthrop*, 6 Q. B. 891; *per* Best, C. J., in *Looker v. Halcomb*, 4 Bing. 188. See *R. v. Cotton*, 1 E. & E. 203; *Exp. Storey*, 3 Q. B. D. 166.

(*b*) *Per Fortescue, J.*, in *Pierce v. Hopper*, 1 Stra. 260.

<sup>28</sup> [*Hersom's Case*, 39 Me. 476. But see] *Cullen v. Trimble*, L. R. 7 Q. B. 416; *Johnson v. Colam*, L. R. 10 Q. B. 544, where an Act which, without expressly empowering any tribunal to try the offence, imposed penalties on any person who exposed diseased animals for sale, unless he showed "to the justices before whom he is charged," that he was ignorant of the condition of the animals, and gave him an appeal if he felt aggrieved "by the adjudication of justices," was

construed as plainly giving justices jurisdiction over the offence. See *Stable v. Dixon*, 6 East, 163; *R. v. St. James, Westminster*, 2 A. & E. 241; *R. v. Worcestershire*, 3 E. & B. 488, 23 L. J. M. C. 113. [Comp. post, § 377.]

(*c*) *R. v. Metrop. Com. Sewers*, 1 E. & B. 694, 22 L. J. 234. *Comp. Bradley v. Southampton Board*, 4 E. & B. 1014, 24 L. J. 239; *R. v. Burslem Board*, 1 E. & E. 1077, 29 L. J. 242.

<sup>27</sup> *Streat v. Rothschild*, 12 Daly, (N. Y.) 95; and see *Druse v. Horter*, 57 Wis. 644. As to construction of arbitration Acts generally, see ante, § 108.

<sup>28</sup> *Camp v. Ingersoll*, 86 N. Y. 433. This same construction, however, would make a statute authorizing a reference in cases "involving matters of account," directly applicable to a suit upon a tax-collector's bond, to recover a balance due by him, as shown by his accounts: *Marlar v. State*, 62 Miss. 677.

act against its clear meaning so as to give a court jurisdiction."

[The presumption against the creation of a new jurisdiction is all the stronger where the jurisdiction is already vested in a superior body. Thus, where an act provided for the trial and determination of contested elections of members of the Legislature by the Court of Common Pleas of the proper county, and directed the court, after hearing to decide which of the candidates had received the greatest number of legal votes and was entitled to a certificate of election, it was held that this was all the court could do, and that it had no power to enter any judgment or make any decree declaring which claimant was entitled to the offices, the final determination of that matter belonging to the Legislature itself, which was at liberty to disregard every conclusion of fact or law found by the Court.<sup>30</sup>]

§ 156. **Effect to be Given to Necessary Implication.**—However, effect must of course be given to the intention, where the Act, without conferring jurisdiction in express terms, does so by plain and necessary implication. A recent enactment has been considered as granting jurisdiction by implication, in a remarkable manner. The 31 & 32 Vict. c. 71, after reciting that it was desirable that some County Courts should have Admiralty jurisdiction, and authorizing the Queen in council to confer such jurisdiction on any of those Courts, empowered them to try certain classes of cases over which the Court of Admiralty had jurisdiction; directing the judge to transfer any case to the Admiralty, where the amount claimed exceeded 300*l.*, and giving also to the latter Court, in all cases, not only an appeal, but power to transfer to itself any suit instituted in the lower Court. By a supplementary Act passed in the following session (32 & 33 Vict. c. 51), the County Courts on which Admiralty jurisdiction had been thus conferred, were further authorized to try any claim arising out of any agreement made in relation to the use or hire of any ship, or in relation to the carriage of any goods

<sup>30</sup> *Pitman v. Flint*, 10 Pick. (Mass.) 506. See ante, § 6; but also post, § 265, *Chapman v. State*,

16 Tex. App. 76.

<sup>31</sup> *In Re Cont. Election of McNeill*, 111 Pa. St. 235

in any ship, where the claim does not exceed 300%. The Court of Admiralty had no jurisdiction over these cases before the Act was passed, but it followed that in thus giving the County Court this jurisdiction, the Statute also gave, by mere implication, to the Admiralty Court, not only appellate, but original jurisdiction also; besides introducing the anomaly of dealing with small cases on different principles of law from large ones; while the apparent object of the enactments was merely to distribute the existing Admiralty jurisdiction (*a*).

§ 157. **New Jurisdiction and Remedies not Extended by Construction.**—[But, it follows from the application of the presumption against the creation of new jurisdictions and remedies, that where such are given, they are not to be extended beyond the fair import of the legislative grant.<sup>21</sup> Neither, on the other hand, are they to be unduly confined. Thus, an act giving jurisdiction of disputes between non-residents and citizens, would include a case where but one of the defendants is a citizen, the other defendants and all of the complainants being non-residents.<sup>22</sup> And under a statute creating an Orphans' Court, the jurisdiction of the same would not be restricted to orphans and persons under age.<sup>23</sup> And again, where in a statute conferring jurisdiction upon certain courts, the word "not" was inserted clearly by mistake, in such a way as to nullify the intention of the Legislature, the act was read as though that word had been omitted.<sup>24</sup> Indeed, it is said, that, unless some established rule of law is palpably violated, doubts as to jurisdiction may be solved in favor of the tribunal exercising it.<sup>25</sup>

(*a*) See *The Alina*, 5 Ex. D. 227; *Everard v. Kendall*, L. R. 5 C. P. 428; *Simpson v. Blues*, L. R. 7 C. P. 290; *Gunnestad v. Price*, L. R. 10 Ex. 65; *Gaudet v. Brown*, L. R. 5 P. C. 184, and the cases there cited. See also *Smith v. Brown*, L. R. 6 Q. B. 729; *The Dowse*, L. R. 3 A. & E. 135; *Allen v. Garbutt*, 6 Q. B. D. 165, 50 L. J. 141.

<sup>21</sup> *Pringle v. Carter*, 1 Hill (S. C.)

53; and see *Thomas v. Adams*, 2 Port. (Ala.) 188.

<sup>22</sup> *Turner v. O'Bannon*, 2 J. J. Marsh. (Ky.) 186. See *The Removal Cases*, 100 U. S. 457.

<sup>23</sup> *Wood v. Tallman*, 1 N. J. L. 153.

<sup>24</sup> *Chapman v. State*, 16 Tex. App., 76; but see ante, § 155.

<sup>25</sup> *Smith v. People*, 47 N. Y. 330. See *Stuart v. Laird*, 1 Cranch, 299; post, § 527.



§ 158. **Summary Jurisdictions.**—[The presumption against an intention to create a new jurisdiction applies] especially when it would have the effect of depriving the subject of his freehold, or of any common law right, such as the right of trial by jury, or of creating an arbitrary procedure.<sup>36</sup> It has been said that words conferring such a jurisdiction must be clear and unambiguous (*a*). [Not only where the statute is so defectively drawn, that, in one part it appears as though it should be executed summarily, and in another, in the usual way, must the latter construction be preferred ;<sup>37</sup> but, where the jurisdiction given by the statute is clearly a summary one, it is the universal rule in this country, as well as in England,<sup>38</sup> that the provisions of the statute are to be strictly construed. This principle is established, or rather acted upon, in innumerable cases, declaring that no presumptions are to be made in favor of such jurisdiction; that the record of the proceedings under it must show all the facts necessary to give it, and strict compliance with all the details prescribed by the statute<sup>39</sup> conferring it; and that the jurisdiction is to be limited to the precise cases contemplated by the statute. The stringency of these rules, however, is aided by other presumptions, which will hereafter appear, and to the discussion of which any further examination of it seems properly referable.<sup>40</sup>

§ 159. **United States Courts.**—[The presumption against the extension, or creation of new jurisdictions is one of considerable practical importance as affecting the powers of federal courts. The federal courts have, strictly speaking, no common law jurisdiction ;<sup>41</sup> and as their jurisdiction is special and not general, there can be no presumption of jurisdiction in their favor and the record must disclose all the facts necessary to give them cognizance of the case under the various acts of Congress.<sup>42</sup> In the construction of

<sup>36</sup> See ante, cases in note *a*, p. 217.

(*a*) *Per* Keating, J., in *James v. S. E. R. Co.*, L. R. 7 Ex. 296.

<sup>37</sup> *Bennett v. Ward*, 3 Cai. (N. Y.) 259.

<sup>38</sup> See *Davison v. Gill*, 1 East, 64, *per* Kenyon, C. J.

<sup>39</sup> See Bish., Wr. L. § 193.

<sup>40</sup> See post, §§ 262, 344, 351.

<sup>41</sup> Field, Fed. Cts. p. 125, and cases cited in note 2.

<sup>42</sup> Field, Fed. Cts. pp. 136-7, and cases in note 1; p. 268, and cases in notes 4-8.

these acts, however, a reasonable liberality is not to be denied to their language. Hence, under an act, conferring upon circuit courts jurisdiction in "all suits of a civil nature at common law or in equity" the latter term "does not limit the jurisdiction merely to suits which the old common law recognizes as among its fixed and settled proceedings, but it embraces all suits in which legal rights are to be ascertained and determined, as well as rights in equity;" and the phrase "suits of a civil nature" is held to include an action of forcible entry and detainer," an action to recover money lost at gaming or horse-racing," a suit against a sheriff for an escape or other neglect or misdemeanor," and the like." So under an act which gave jurisdiction in controversies between citizens of different states, it was held that the term citizen, in that act, embraced not only those technically citizens, *i. e.*, possessing the requisite qualifications for voting and holding real estate, but anyone who resides in, and is an inhabitant of a state." And corporations are regarded as citizens within the meaning of the law," to the extent of including municipal corporations."

§ 160. *Special Jurisdictions.*—[Upon the principle under discussion, any special jurisdiction, conferred upon a court for a particular emergency, is not to be extended beyond its purpose, and the facts giving the jurisdiction must appear. Thus, where an act gave authority to a corporation to take land for the construction of a canal, and provided, that, if the company could not agree with the owners as to compensation, the parties might appoint viewers to

<sup>43</sup> Field, Fed. Cts. p. 110, cit: Kohl v. U. S., 91 U. S. 367; U. S. v. Block, 3 Biss. 208.

<sup>44</sup> Wheeler v. Bates, 6 Biss. 88.

<sup>45</sup> Grant v. Hamilton, 3 McLean, 100.

<sup>46</sup> Mewster v. Spaulding, 6 McLean, 24.

<sup>47</sup> See Field, Fed. Cts. p. 110, from whence the above instances are borrowed.

<sup>48</sup> See Field, Fed. Cts. p. 115, citing Prentiss v. Barton, 1 Brock. 389; Cooper v. Galbraith, 3 Wash. 546; Gardner v. Sharp, 4 Id. 609;

DeWolf v. Rabaud, 1 Pet. 476; Shelton v. Tiffin, 6 How. 163. Compare, however, Dred Scott v. Sanford, 19 How. 393.

<sup>49</sup> Field, Fed. Cts. p. 121, citing O. & M. R. R. Co. v. Wheeler, 1 Black, 296; Louisville R. R. Co. v. Letson, 1 How. 497; Marshal v. R. R. Co., 16 Id. 314; Covington, etc., Co. v. Shepherd, 21 Id. 212; Railroad v. Harris, 12 Wall. 65; R. R. Co. v. Whitton, 13 Id. 270.

<sup>50</sup> Field, Fed. Cts. p. 135, and cases cited there.

assess the damages ; or, if any of the owners should refuse to join in such appointment, or be *femes covert*, infants, or non *compotes mentis*, the court of common pleas might appoint the viewers: it was held that the jurisdiction of the common pleas could attach only, if the owners, not being within the disabilities mentioned, refused to join in the appointment of viewers, and that the record of the proceedings must show that the requisites of the act had been complied with.<sup>51</sup>

[Analogous to the rule as to such special jurisdictions seems the doctrine that "a statute will not be construed, unless express words require, to confer jurisdiction on courts established under another power ; as, if it is a statute of the United States, to give authority to State tribunals."<sup>52</sup>]

§ 161. **Presumption against Intent to Affect Government. Eminent Domain.**—On probably similar ground rests the rule commonly stated in the form that the Crown is not bound by a statute unless named in it.<sup>53</sup> It has been said that the law is *prima facie* presumed to be made for subjects only (*a*), [that "the general business of the legislative power is to establish laws for individuals, not for the sovereign."<sup>54</sup>] At all events, the Crown is not reached except by express words, or by necessary implication, in any case where it would be ousted of an existing prerogative or interest (*b*). It is presumed that the Legislature does not intend to deprive the Crown of any prerogative, right or property, unless it expresses its intention to do so in explicit terms, or makes the inference irresistible. Where, therefore, the language of the statute is

<sup>51</sup> *Jones v. Tatham*, 20 Pa. St. 398. See also *Haley v. Petty*, 42 Ark. 392, and post, § 351.

<sup>52</sup> *Bish., Wr. L.*, § 142, cit. *Houston v. Moore*, 5 Wheat. 1, 42, 66 ; *In re Bruni*, 1 Barb. (N. Y.) 187, 208.

<sup>53</sup> Compare *Sedgw.*, at p. 28 : "The English precedents are based on the old feudal ideas of royal dignity and prerogative"; and see post, § 166, note.

(*a*) *Willion v. Berkley, Plowd.* 236 ; *per Cur. in Atty.-Genl. v. Donaldson*, 10 M. & W. 117.

<sup>54</sup> *Jones v. Tatham*, 20 Pa. St.

398, 411.

(*b*) *Inst.* 191, *Atty.-Genl. v. Allgood, Parker*, 3 ; *Bac. Ab. Prerogative*, E. 5 (*c*) ; *Co. Litt.* 43b. ; *Chit. Prerogative*, 382 ; *Ayscough's Case*, *Cro. Car.* 526 ; *Huggins v. Bambridge*, *Willes*, 241 ; *R. v. Wright*, 1 A. & E. 437. [*U. S. v. Hewes, Crabbe*, 307 ; *U. S. v. Greene*, 4 *Mason*, 427 ; *U. S. v. Hoar*, 2 *Id.* 311 ; *Stoughton v. Baker*, 4 *Mass.* 522 ; *Jones v. Tatham*, 20 Pa. St. 398 ; *State v. Milburn*, 9 *Gill (Md.)* 105 ; *Alexander v. State*, 56 *Ga.* 478 ; *Cole v. White*, 32 *Ark.* 45.]

general, and in its wide and natural sense would divest or take away any prerogative or right, [titles or interests] from the Crown, it is construed so as to exclude that effect (*a*). Thus, the compulsory clauses of Acts of Parliament, which authorize the taking of lands for railway or other purposes, such as are contained in the Lands Clauses Act of 1845, would not apply to Crown property, unless made so applicable in express terms or by necessary inference (*b*). [So, where an act of Assembly authorized a corporation to cut a canal or passage for steamboats and vessels through an island, taking therefor not more than 600 feet in width, the passage, when made, to be a public highway; and authorized the company to enter upon and occupy for the purpose of making said canal, any land upon which the same might be located,—it was held, that, if the island, at the time of the passage of the act, was the property of the Commonwealth and not of private individuals, the company, under that act, derived no title to any part of it, because words of a statute, applying to private rights, do not affect those of the state, in the absence of a plain expression, or necessary implication to the contrary.<sup>66</sup>

§ 162. [Upon the same basis rests the doctrine that the grant to a corporation by the legislature of a general power to take real estate for the purposes of the incorporation does not extend to property already dedicated to and held for another public use by authority of law,—as, *e. g.*, public highways,<sup>67</sup> or property held by a city for reservoir purposes.<sup>68</sup> Though such a power may be given by express grant,<sup>69</sup> and though

(*a*) Bac. Ab. Prerog. E. 5; Crooke's Case, Show. 208. [State v. Kinne, 41 N. H. 238; State v. Garland, 7 Ired. L. (N. C.) 48. See also: Martin v. State, 24 Tex. 61; Green v. U. S., 9 Wall. 655.] So the Bankruptcy Acts have always been held not to bind the Crown: Exp. Russell, 19 Ves. 165; Exp. Postmaster-Gen'l, 10 Ch. D. 595. [See, to same effect, in the United States: Bish., Wr. L., § 103, citing U. S. v. Herron, 20 Wall. 251, and other cases.]

(*b*) 8 Vict. c. 18; *Re Cuckfield Board*, 19 Beav. 153, 24 L. J. Ch. 585.

<sup>66</sup> Jones v. Tatham, 20 Pa. St. 398.

<sup>67</sup> Com'th v. R. R. Co., 27 Pa. St. 339, 354; Pa. R. R. Co's. App., 93 Id. 150.

<sup>68</sup> State v. R. R. Co., 35 N. J. L. 328.

<sup>69</sup> D. H. & W. R. R. Co. v. Com'th, 73 Pa. St. 29; Stormfeltz v. Turnp. Co., 18 Id. 555.

a grant of it may even be inferred by necessary implication," either from the language of the statute (where it gives, *e. g.*, to a railroad company, an absolute right to construct its road by the most practicable route its engineers may select," or by a direct practicable route, as to it may seem most advantageous," or by the most direct and least expensive route between its termini,") or from actual, controlling necessity, which arises from the circumstances of the case, over which the company has no control, and into which considerations of mere economy do not enter:" yet such implication cannot arise if the powers expressly conferred can, by reasonable intendment, be exercised without such appropriation of public property."

§ 163. **Statutes Imposing Taxation.**—[Again, it is a general principle, that the tax laws of a state refer to private and not to public property." "The public is never subject to tax laws, and no portion of it can be, without express statute. No exemption is needed for any public property held

<sup>59</sup> *Com'th v. R. R. Co.*, 27 Pa. St. 339.

<sup>60</sup> *D. H. & W. R. R. Co. v. Com'th*, 73 Pa. St. 29.

<sup>61</sup> *Pittsburgh v. R. R. Co.*, 48 Pa. St. 355.

<sup>62</sup> *Cleveland, &c., R. R. Co. v. Speer*, 56 Id. 325.

<sup>63</sup> *Pa. R. R. Co's App.*, 93 Pa. St. 150; *Stormfeltz v. Turnp. Co.*, 13 Id. 555.

<sup>64</sup> *Exp. Boston, &c., R. R. Co.*, 53 N. Y. 574; and see *Springfield v. R. R. Co.*, 4 Cush. (Mass.) 63; *Little Miami, &c., R. R. Co. v. Dayton*, 23 Ohio St. 510. But see, as to the appropriation of the tracks of another railroad: *Northern R. R. Co. v. R. R. Co.*, 27 N. H. 183; *New York, &c., R. R. Co. v. R. R. Co.*, 36 Conn. 196.

<sup>65</sup> [See *Cooley, Taxation*, pp. 130-131; 2 *Dillon, Mun. Corp.*, §§ 614-615]. So, as it is a prerogative of the Crown not to pay tolls or rates, or other burdens in respect of property, it was long since established that the Poor Act of Elizabeth, which authorizes the imposi-

tion of a poor-rate on every "inhabitant and occupier" of property in the parish, did not apply to the Crown, or to its direct and immediate servants, whose occupation is for the purposes of the Crown exclusively, and so is, in fact, the occupation of the Crown itself: 43 *Eliz. c. 2*. *Per* Lord Westbury and Lord Cranworth in *Mersey Docks Co. v. Cameron*, 11 H. L. 443, 35 L. J. M. C. 22, 25; *Amherst v. Somers*, 2 T. R. 372; *R. v. Harrowgate*, 15 Q. B. 1012; *R. v. St. Martin's*, L. R. 2 Q. B. 493. Thus, property occupied by the servants of the State for public purposes, as the Post Office: *Smith v. Birmingham*, 7 E. & B. 483; the Horse Guards: *Amherst v. Somers*, 2 T. R. 372; *R. v. Jay*, 8 E. & B. 419; the Admiralty: *R. v. Stewart*, 8 E. & B. 360; and even by local police: *Lancashire v. Shelford*, E. B. & E. 230; by the judges, as lodgings at the assizes: *Hodgson v. Carlisle*, 8 E. & B. 230; by a county court: *R. v. Manchester*, 3 E. & B. 336; or for a jail: *R. v. Shepherd*, 1 Q. B.

as such.”<sup>66</sup>] But if the tax attached to the land, and not to its owner or occupier, this rule would not be applicable; and land charged with it in the hands of a subject, would not become exempted on vesting in the Sovereign (*a*).

§ 164. *Statutes of Limitations.*—On the same general principle, the numerous Acts of Parliament which have, at various times, taken away the writ of certiorari, have always been held not to apply to the Crown (*b*). So, the 13 Geo. 2, c. 18, s. 5, which limits the time for issuing that writ to six months from the date of the conviction (*c*), and the 12 & 13 Vict. c. 45, s. 5, which authorizes the Quarter Sessions to give costs to the successful party in any appeal (*d*), do not apply to the Crown (the prosecutor), but only to the defendant. On the same ground, it would seem, the 4 Anne, c. 16, s. 4, which authorized a “defendant” or tenant,” with

170; *Beds v. St. Paul*, 7 Ex. 650. See the judgments of Blackburn, J. and Lord Cranworth in *Mersey Docks Co. v. Cameron*, 11 H. L. 443, 35 L. J. M. C. 10; *Leith Comm. v. Poor Insp’rs*, L. R. 1 Sc. App. 17; or reformatory school; *Shepherd v. Bradford*, 16 C. B. N. S. 369, 33 L. J. M. C. 182. See *Bro. Ab. Prerog. du Roy*, 112; *King v. Cook*, 3 T. R. 519; *Westover v. Perkins*, 2 E. & E. 57, 28 L. J. M. C. 227; or by the commissioners of public works and buildings in respect of a toll-bridge of which they were in occupation as servants of the Crown: *R. v. McCann*, L. R. 3 Q. B. 677; was held exempt from poor-rate. (*Comp. Bute v. Grindall*, 1 T. R. 338; *R. v. Ponsonby*, 3 Q. B. 14; *R. v. Shee*, 4 Q. B. 2; *R. v. Stewart*, 8 E. & B. 360.) And property in the occupation of the Sovereign would, also, not be liable to the common law burden of church rates or sewer’s rate; one reason assigned being that they could not be enforced: *Per Dr. Lushington in Smith v. Keats*, 4 Hagg. 279; *Atty.-Genl. v. Donaldson*, 10 M. & W. 117. So, the Royal Dockyards at Deptford were held not assessable to the land tax: *Atty.-Genl. v. Hill*, 2 M. & W. 160.

<sup>66</sup> *Directors of the Poor v. School*

*Directors*, 42 Pa. St. 21. But under an act providing that “all property,” other than that which is in actual use for certain purposes therein before specified, “and from which any income or revenue is derived,” shall be subject to taxation, a municipality owning water-works from which a revenue was derived by means of water rates paid by consumers, was held subject to taxation for county purposes, irrespectively of the question whether the revenue thus derived was paid into the treasury of the municipality or used in maintaining and improving the property: *Erie Co. v. Commissioners*, 113 Pa. St. 368.

(*a*) *Colchester v. Kewney*, L. R. 1 Ex. 368.

(*b*) See, *ex. gr.* *R. v. Cumberland*, 3 B. & P. 354; *R. v. Allen*, 15 East, 333; *R. v. Boulton*, 4 A. & E. 498.

(*c*) *R. v. Farewell*, 2 Stra. 1209; *R. v. James*, 1 East, 303n; *R. v. Berkeley*, 1 Ken. 80.

(*d*) *R. v. Beadle*, 26 L. J. M. C. 111, 7 E. & B. 492.

<sup>67</sup> Ordinarily the terms plaintiff and defendant, in a statute, apply to individuals only, not to states, counties or municipal corporations: *Schuyler Co. v. Mercer Co.*, 9 Ill. 20.

the leave of the Court, to plead several matters, was held not to extend to defendants in suits by or on behalf of the Crown (*a*); nor was the right of the Crown as to proceedings in the Exchequer touching the revenue or property of the Crown, affected by the County Court, or Judicature, or Companies (1862) Acts (*b*). The Statutes of Limitation (*c*) have always been held not to bind the Crown [in England, nor the Government of the United States in this country," unless so expressed." With reference to state governments, the rule is practically the same." And it is immaterial

(*a*) *Atty.-Genl. v. Allgood*, Parker, 1; *Atty.-Genl. v. Donaldson*, 7 M. & W. 422, 10 M. & W. 117; *R. v. Abp. of York, Willes*, 533; *Hall v. Maule*, 4 A. & E. 283.

(*b*) *Mountjoy v. Wood*, 1 H. & N. 58; *Atty.-Genl. v. Constable*, 4 Ex. D. 172; *Atty.-Genl. v. Barker*, L. R. 7 Ex. 177; *Re Henley*, 9 Ch. D. 469.

(*c*) 11 Rep. 68b, and 74b; *Lambert v. Taylor*, 4 B. & C. 138, 6th point; *Rustonjee v. R.*, 1 Q. B. D. 487, 2 Q. B. D. 69.

<sup>68</sup> U. S. v. Thompson, 98 U. S. 486; U. S. v. Ry. Co., 118 Id. 120; U. S. v. Williams, 5 McLean 133; U. S. v. Davis, 3 Id. 483; U. S. v. Hoar, 2 Mass. 311 (neither the general statute, nor the statute of limitations of Massachusetts as to executors and administrators); U. S. v. White, 2 Hill (N. Y.) 59 (on a note, though held by the U. S. by transfer; *aliter*, where the statute began to run before transfer to the U. S.: *Ibid.*); *Robb v. Washington Co.*, 62 Miss. 589; *Bates v. Aven*, 60 Id. 955; *Swearing v. U. S.*, 11 Gill and J. (Md.) 373; *McNamee v. U. S.*, 11 Ark. 148.

<sup>69</sup> *Gibson v. Chateau*, 13 Wall. 92; *Swann v. Lindsey*, 70 Ala. 507.

<sup>70</sup> *Lindsey v. Miller*, 6 Pet. 666; *People v. Gilbert*, 18 Johns. (N. Y.) 227; *Stoughton v. Baker*, 5 Mass. 522; *Wright v. Swan*, 6 Port. (Ala.) 84; *Kennedy v. Townley*, 16 Ala. 239; *Ware v. Greene*, 37 Id. 494; *Bledsoe v. Doe*, 5 Miss. 13; *Parmilee v. McNutt*, 9 Id. 179; *State v. Joiner*, 23 Id. 500; *Joselyn v. Stone*, 28 Id. 753; *Bailey v. Wallace*, 16 Serg. and R. (Pa.) 245;

*Munshower v. Patton*, 10 Id. 334; *Com'th v. Baldwin*, 1 Watts (Pa.) 54; *Com'th v. Johnson*, 6 Pa. St. 136; *Glover v. Wilson*, Id. 290; *McKeehan v. Com'th*, 3 Id. 151; *Com'th v. Hutchinson*, 10 Id. 466; *Troutman v. May*, 33 Id. 455; *Zacherie's Succession*, 30 La. An. P. II. 1260; *Carey v. Whitney*, 48 Me. 516; *State Treas'r v. Weeks*, 4 Vt. 215; *Parks v. State*, 7 Mo. 194; *State v. Pratte*, 8 Id. 286; *State v. Fleming*, 19 Id. 607; *Re Life Assoc'n*, 12 Mo. App. 40; *Jefferson v. Whipple*, 71 Mo. 519; *Wallace v. Miner*, 6 Ohio 366; *State v. St. Joseph Co.*, 90 Ind. 359; *Jackson Co. v. State*, 106 Ind. 270; *Putnam v. State*, Id. 531; *Hardin v. Taylor*, 4 T. B. Moh. (Ky.) 516; *State v. Arledge*, 2 Bailey (S. C.) 401; *Harlock v. Jackson*, 3 Brev. (S. C.) 254; *State v. Pinckney*, 22 S. C. 484; *Brinsfield v. Carter*, 3 Ga. 143; *Walls v. McGee*, 4 Harr. (Del.) 108; *State v. School Distr.*, 34 Kan. 237; *Weatherhead v. Bledsoe*, 2 Overt. (Tenn.) 352; *Wilson v. Hudson*, 8 Yerg. (Tenn.) 398; *Nimmo v. Com'th*, 4 Hen. & M. (Va.) 57; *Levasser v. Washburn*, 11 Gratt. (Va.) 572. But, of course, the State may plead the statute of limitations in actions against it: *Baxter v. State*, 10 Wis. 454; *Auditor v. Halbert*, 78 Ky. 577. But, as between States, in controversies relating to boundaries, the statutes of limitation cannot be applied in all their rigor, nor will a title by prescription be acquired as readily: *Rhode Island v. Massachusetts*, 15 Pet. 233. It is said that no prescription runs against the State:

whether the suit be brought in the name of the state, or of another party to its use." Indeed, the principle has been extended so as to bar the application of the statutes to persons claiming under the government; *e. g.*, a tenant in possession of land, or the holder of a certificate of survey, or purchaser, while the title remains in the state."<sup>71</sup> But, on the other hand, it has been held that the statutes may be pleaded against a grantee of the United States;<sup>72</sup> in a suit against the Bank of the United States, though the government was a stockholder;<sup>73</sup> in a suit in which the state is only a nominal, and, *e. g.*, a township the beneficial and real party,<sup>74</sup> or in a suit upon a bail bond,<sup>75</sup> or in an action for a mandamus in the name of the state, to enforce a private right;<sup>76</sup> and to a private individual who holds a title to land from an Indian reservee, which, without a patent, entitled him to maintain ejectment.<sup>77</sup>

§ 165. **Municipalities.**—[It has been held, that municipalities, being but parts of the state government, subdivision of its sovereignty, as it were, exercising delegated political powers for public purposes,<sup>78</sup> in so far partake of that sovereignty as to share in the exemption from the effects of

Glaze v. R. R. Co., 67 Ga. 761; and see Walls v. McGee, 4 Harr. (Del.) 108; Carey v. Whitney, 48 Me. 516; Alton v. Trans. Co., 12 Ill. 38. But see post, §§ 166-8.

<sup>71</sup> Glover v. Wilson, 6 Pa. St. 290, 293.

<sup>72</sup> Smead v. Williams, 6 Ga. 158; Duke v. Thompson, 16 Ohio 34. And see Truehart v. Babcock, 49 Tex. 249.

<sup>73</sup> Chicago, &c., Ry. Co. v. Allfree, 64 Iowa 500.

<sup>74</sup> U. S. B'k v. McKenzie, 2 Brock. 393. But see State B'k v. Brown, 2 Ill. 106, that a debt due the State Bank, was a debt due the State, and could not be barred by the statute of limitations.

<sup>75</sup> Miller v. State, 38 Ala. 600. See also Glover v. Wilson, 6 Pa. St. 290, 293.

<sup>76</sup> Straus v. Com'th, 1 Duv. (Ky.) 149. Compare, however, Ware v. Greene, 37 Ala. 494; Ala. Sel. Cas. 383, that the statute does not

apply to suits by the State against sureties of public officers; nor, Glover v. Wilson, 6 Pa. St. 290, to a suit upon a tax-collector's bond, which includes both State and County taxes; nor, State v. Pratte, 8 Mo. 286, upon official bonds. But see Furlong v. State, 58 Miss. 717, post, § 167.

<sup>77</sup> Moody v. Fleming, 4 Ga. 115.

<sup>78</sup> Dillingham v. Brown, 38 Ala.

311. In a case where the occupant of land has been permitted to hold possession thereof for a period fixed or recognized by the laws as giving title, it was held a grant would be presumed against the government by analogy to the statute of limitations: Jones v. Borden, 5 Tex. 410.

<sup>79</sup> Baltimore v. Root, 8 Md. 95; wherefore, in a statute authorizing attachments on judgments to be laid in the hands of any "person or persons" whatever, the words "person or persons" were held



statutes of limitations," at least in all cases wherein they represent the public at large, or seek to enforce a right pertaining to sovereignty, and not its mere private rights, such, *e. g.*, as the collection of taxes."

[But the weight of authority seems to be the other way, and to concede this exemption only to sovereignty itself. Thus statutes of limitations have been held to run against counties;<sup>80</sup> against a town or city corporation,<sup>81</sup> and generally, in the absence of provisions to the contrary, against municipal and quasi-municipal corporations, as against natural persons.<sup>82</sup>

[And, of course, municipal corporations have the benefit of the statutes of limitations.<sup>83</sup>]

§ 166. **When Government is Included.**—The Crown, however, is sufficiently named in a statute, within the meaning of the maxim, when an intention to include it is manifest. For instance, the 20 & 21 Vict. c. 43, which entitles (by section 2) either party, after the hearing, by a justice, of "any information or complaint" which he has power to determine, to apply for a case for the opinion of one of the Superior Courts; and after authorizing (by section 4) the justice to refuse the application, if he deems it frivolous, provides that it shall never be refused when made by, or under the direction of the Attorney-General, and directs (by section 6) the Superior Court, not only to deal with the decision appealed against, but to make such order as to costs as it deems fit, was held by the Queen's Bench to include

not to embrace a municipal corporation: *Ibid.* And see *Bulkley v. Eckert*, 3 Pa. St. 368; and post, § 251.

<sup>80</sup> See *Kellogg v. Decatur Co.*, 38 Iowa, 524; *Coleman v. Thurmond*, 56 Tex. 514; *City of Alton v. Trans. Co.*, 12 Ill. 38.

<sup>81</sup> See *Simplot v. Ry. Co.*, 16 Fed. Rep. 350; though, even in such cases, when justice demands and to prevent a wrong to private rights, the doctrine of estoppel in pais may be applied: *Ibid.*

<sup>82</sup> *Glover v. Wilson*, 6 Pa. St. 290, 293; *Evans v. Erie Co.*, 66 Id. 223 (though a grantee from the state, from the date of the grant); *St. Charles Co. v. Powell*, 22 Mo.

525; *Ouachita Co. v. Tufto*, 43 Ark. 136; *Houston, etc., Ry. Co. v. Travis Co.*, 62 Tex. 16.

<sup>83</sup> *Cincinnati v. First Presb. Church*, 8 Ohio, 298; *Lane v. Kennedy*, 13 Ohio St. 42; *Cincinnati v. Evans*, 5 Id. 494; *Jefferson v. Whipple*, 71 Mo. 519.

<sup>84</sup> See *Wheeling v. Campbell*, 12 W. Va. 36; *Forsyth v. Wheeling*, 19 Id. 318; *Fort Smith v. McKibbin*, 41 Ark. 45, where adverse possession of an alley of a city for the statutory period, was held to give title to the occupant.

<sup>85</sup> *Gaines v. Hot Spring Co.*, 39 Ark. 262; *Conyngham Sch. Distr. v. Columbia Co.*, 6 Leg. Gaz. (Pa.) 26.

the Crown, and to authorize an order against it for the payment of costs. The language of the second section was wide enough to include the Crown; and as the fourth referred to the Crown as plainly as if it had spoken expressly of Crown cases, the language of the sixth authorizing costs was construed as applying to such cases also, as well as to cases between subject and subject (*a*).

It is said that the rule does not apply when the Act is made for the public good, the advancement of religion and justice, the prevention of fraud,<sup>85</sup> or the suppression of injury and wrong (*b*); but it is probably more accurate to say that the Crown is not excluded from the operation of a statute where neither its prerogative, rights, nor property are in question.<sup>87</sup> The Statute de donis (*c*); the Statute of Merton, against usury running against minors (*d*); the 22 Hen. 3, c. 22 (Marlbridge), against distraining freeholders to produce their title deeds (*e*); the 32 Hen. 8, concerning discontinuances (*f*); the 31 Eliz., against simony (*g*); the 13 Eliz., c. 10, respecting ecclesiastical leases (*h*), were held to apply to the Crown, though not named in them (*i*). So, the 11 Geo. 4 & 1 Will. 4, c. 70, which was passed for the better administration of justice, and enacted that writs of error upon judgments given in any of the

(*a*) *Moore v. Smith*, 1 E. & E. 597, 28 L. J. 126. See *Theberge v. Landry*, 2 App. 102, and *Cushing v. Dupuy*, 5 App. 409. But, although the Crown be named in some sections, this does not necessarily extend to it the operation of other parts of the Statute: *Exp. Postmaster-General*, 10 Ch. D. 595.

<sup>85</sup> In such cases, it is said, the state is included by the term persons: *Martin v. State*, 24 Tex. 61; and see *State v. Bancroft*, 23 Kan. 170, that "agent" may mean an agent or officer of the state, under an act against embezzlement; also *Bish., Wr. L.*, § 212.

(*b*) *Case of Ecclesiastical persons*, 5 Rep. 14a, *Magdalen College Case*, 11 Rep. 70b-73a; *R. v. Abp. of Armagh*, Stra. 516; *Bac. Abr. Prerogative*, E. 5. [*Com'th v. Garrigues*, 28 Pa. St. 9.]

<sup>87</sup> See *U. S. v. Knight*, 14 Pet. 301; *Fink v. O'Neil*, 106 U. S. 272; and comp. *Sedgw.*, at p. 28: "Where the terms of an act are sweeping and universal, I see no good reason for excluding the Government, if not especially named, merely because it is the Government;" and at p. 107: "Nor do I understand why the Government should be exempted from the operation of general rules of law, or the fair interpretation of language." But see post, § 167.

(*c*) 13 Ed. 1; *Willion v. Berkley*, Plowd. 223; 11 Rep. 72a.

(*d*) 20 Hen. 3; *Co. Litt.* 120a, note 3.

(*e*) 2 Inst. 142.

(*f*) 2 Inst. 681.

(*g*) *Co. Litt.* 120a, note 3.

(*h*) 5 Rep. 14a, 11 Rep. 66b, *Stra.* 516.

(*i*) See *Bac. Ab. Prerog.* E. 5.

Superior Courts, should be returned to the Exchequer Chamber, was held to apply to a judgment on an indictment (*a*), and on a petition of right (*b*); although the Crown was not named or referred to in the Act. No prerogative was affected by this construction (*c*).

§ 167. [Indeed, wherever the mischiefs to be remedied by an act are of such a nature as necessarily to include the State, as intended to be within the meaning of and affected by the act, the rule under discussion becomes obviously inapplicable.<sup>88</sup> Bearing in mind, that, in the nature of things, there must be a presumption that the legislative power, in creating its laws, has primarily in view the establishment of rules regulating the conduct and affairs of individuals,<sup>89</sup> not those of the sovereignty, and that the general language of an act is to be restricted to the object the Legislature had in view when using such language, it is manifestly misleading, if not technically inaccurate, to say, as has been held, that the sovereign power is not, in this country, exempted, by virtue of its prerogative, from the operation of any general laws, except those prescribing limitations,<sup>90</sup> and probably too narrow to say that the rule excluding the sovereignty is applicable only where neither its rights, property or prerogative are in question.<sup>91</sup> It has, indeed, been held, that, under an act requiring "all" suits upon "any bond, obligation, or contract under seal" to be brought within seven years, suits by the State upon official bonds were barred after the lapse of that period.<sup>92</sup> On the other hand the term "person" in a statute of wills, authorizing devises to any person capable by law of holding real estate, obviously does not include the State or the United States, but only extends to such natural persons and corporations as are authorized by the laws of the State to

(*a*) *R. v. Wright*, 1 A. & E. 434.

(*b*) *De Bode v. R.*, 13 Q. B. 464.

(*c*) *Per Cur.*, Id. 379.

<sup>88</sup> See *Gibson v. Chateau*, 13 Wall. 92.

<sup>89</sup> Ante, § 161.

<sup>90</sup> See *Re Tetlow*, 14 Int. Rev. Rec. 205.

<sup>91</sup> *Supra*, § 166.

<sup>92</sup> *Furlong v. State*, 58 Miss. 717. And by virtue of express statutory declaration, it was held that a statute limiting the time for bringing actions to recover damages for injuries to property ran against the state and one who purchased from the state as against any other private person: *Coleman v. Pesh-tigo Co.*, 47 Wis. 180.

take by devise." It follows that not only the divesting or not divesting of any public right is to be regarded, but also the violation of principles of public policy." The test, therefore, in every case in which the question whether or not the government is included in the language of a statute has to be met and determined, cannot be a mere general rule, either one way or another, arbitrarily applied, but must be the object of the enactment, the purposes it is to serve, the mischiefs it is to remedy, and the consequences that are to follow,—starting with the fair and natural presumption that, primarily, the Legislature intended to legislate upon the rights and affairs of individuals only. This is the only proper extent and application of the rule against inclusion of government. The instances cited in the preceding section militate in favor of this view. A few more may strengthen it. As in England the Crown was held bound by the statute of Westm. 1, c. 5, as to free elections," so it has been said in Massachusetts, that, where general rights are declared, or remedies given, by law, the Commonwealth, though not named, is included ;" by the Supreme Court of the United States, that statutes laying down general rules of procedure in civil actions bind the government ;" in Pennsylvania, that the State is bound by statutes made to prevent tortious usurpations, and to regulate and preserve the right of all elections, and prescribing a method of investigating their legality ;" and in Arkansas, that, if the state descends into the arena of commercial business in concert or competition with its citizens, *e. g.*, in a banking enterprise, it goes, in respect of transactions arising out, or in the course of, the same, divested of its sovereignty, and cannot avail itself of the principle *nullum tempus occurrit reipublicæ*."

" *Re Fox*, 52 N. Y. 530; U. S. v. Fox, 94 U. S. 315.

" See U. S. v. Knight, 14 Pet. 301; and also *Fink v. O'Neil*, 106 U. S. 272.

" 2 Inst. 169.

" *Com'th v. R. R. Co.*, 3 Cush. (Mass.) 25.

" *Green v. U. S.*, 9 Wall. 655.

" *Com'th v. Garrigues*, 28 Pa. St. 9. In this case, the additional

feature was emphasized, that the subject matter of the statute was one in which the state was the chief party in interest,—a fact plainly indicating an intention to include the state, without which effect, indeed, the statute would have been almost inoperative.

" *Calloway v. Cossart*, 45 Ark. 81.

§ 168. [Wherever there is a presumption against the existence of a particular intention on the part of the Legislature, an expression by it, in a statute, of such an intention falls, as has been seen<sup>100</sup> under the rule requiring a certain stringency of construction. Accordingly, it has been held that statutes allowing suits against a state or its governor are to be strictly construed, and the right conferred by them is to be confined to those clearly intended to enjoy it, and not extended, *e. g.*, to aliens, or assignees of aliens.<sup>101</sup> But even in such acts, both suits at law and in chancery will be held included.<sup>102</sup>]

§ 169. **Statutes Presumed to have no Extra-territorial Force.**—Another general presumption is that the Legislature does not intend to exceed its jurisdiction. Primarily, the legislation of a country is territorial. The general rule is, that *extra territorium jus dicenti impune non paretur; leges extra territorium non obligant* (*a*). The laws of a nation apply to all its subjects and to all things within its territories, including in this expression not only its ports and waters which form, in England, part of the adjacent country, but its ships,<sup>103</sup> whether armed or unarmed, and the ships of its subjects on the high seas or in foreign tidal waters and foreign private ships within its ports.<sup>104</sup> They apply also to all foreigners within its territories as regards criminal (*b*), police, and, indeed, all other matters,<sup>105</sup> except some questions of personal status or capacity, in which, by the comity of nations, the law of their own country, or the *lex loci actûs* or *contractûs*

<sup>100</sup> Ante, § 127.

<sup>101</sup> *Rose v. Governor*, 24 Tex. 496. See ante, § 154.

<sup>102</sup> *State v. Curran*, 12 Ark. 321. See ante, § 77.

(*a*) Dig. 2, 1, 20.

<sup>103</sup> See *U. S. v. Holmes*, 5 Wheat 412.

<sup>104</sup> Thus it was held, in *U. S. v. Diekelman*, 92 U. S. 520, that, generally, a merchant vessel entering the port of a foreign country for the purpose of trade, whether in time of war or peace, is, while she remains, subject to the law there in

force, *e. g.*, a prohibition against departing without a clearance.

(*b*) [See *Carlisle v. U. S.*, 16 Wall. 147; *People v. McLeod*, 25 Wend. (N. Y.) 483, 573; 1 Hill, 377; 1 Bish., Cr. L., § 124; Bish., Wr. L., § 141.] So that an American committing a crime in Holland and flying to England is regarded as a Dutch subject for the purposes of extradition: *R. v. Ganz*, 9 Q. B. D. 93, 51 L. J. 419; and see *Atty.-Genl. v. Kwok Ah Sing*, L. R. 5 P. C. 179. See *Addenda*.

<sup>105</sup> *E. g.*, poll-tax: *Kuntz v. Davidson Co.*, 6 Lea (Tenn.) 65.

applies (a). It is true this does not comprise the whole of the legitimate jurisdiction of a State; for it has a right to impose its legislation on its subjects, natural or naturalized (b) in every part of the world (c); ["that is to say, when they return within its territorial jurisdiction so as to give an opportunity to exercise sovereignty over them."<sup>106</sup>] Indeed, on such matters as personal status or capacity it is understood always to do so (d); but, with that exception, in the absence of an intention clearly expressed or to be inferred either from its language or subject matter, or history of the enactment, [in such manner as to admit of no other rational interpretation,<sup>107</sup>] the presumption is that the Legislature does not design its statutes to operate on them, beyond the territorial limits of its jurisdiction (e). They are, therefore, to be

(a) See *Niboyet v. Niboyet*, 4 P. D. 19, *per* Brett, L. J.; *San Theodoro v. San Theodoro*, 5 P. D. 79: *Story, Conf. L.*, 100, et seqq. comp. *Worms v. De Valdor*, 49 L. J. Ch. 261; *Le Sueur v. Le Sueur*, 1 P. D. 139; *Firebrace v. Firebrace*, 4 P. D. 63. [See *Sedgw.*, pp. 56-57.]

(b) *Co. Litt.* 129a; *Story, Conf. L.*, § 21; *Sussex Peerage*, 11 Cl. & F. 85, 146; *Mette v. Mette*, 1 Sw. & Tr. 416, 28 L. J. P. & M. 117.

(c) Our law has at different times made treason, treason-felony, burning the Queen's ships and magazines, breaches of the foreign Enlistment Act, homicide, bigamy, and slave dealing punishable when committed by British subjects in any part of the world; also any offences committed by them on board any foreign ship to which they do not belong (30 & 31 Vict. 124); also, offences by them in native States in India (33 Geo. 3, c. 52, s. 67), in Turkey, China, Siam, and Japan (6 & 7 Vict. c. 94, and 28 & 29 Vict. c. 116); and in some parts of Africa, Australia, and Polynesia (6 & 7 Wm. 4, c. 57; 24 & 25 Vict. c. 31; 26 & 27 Vict. c. 35; 34 Vict. c. 8; 9 Geo. 4, c. 83; 35 & 36 Vict. c. 19).

<sup>106</sup> *Sedgw.*, p. 57.

(d) See *ex. gr. Brook v. Brook*, 27 L. J. Ch. 401; *Story, Conf. L.*, § 114; *Lolley's Case*, 1 R. & R.

236. See also *Story, Conf. L.*, § 100 et. seqq.; *Wheat. Elem. Internat. L.*, pt. 2, c. 2, ss. 6, 7.

<sup>107</sup> *Bond v. Jay*, 7 Cranch 350; *Farnum v. Canal Corp.*, 1 Summ. 46.

(e) *Rose v. Hinely*, 4 Cranch, 241, *per* Marshall C. J.; *The Zollverein*, Swab. 90, *per* Dr. Lushington; *Cope v. Doherty*, 4 K. & J. 357, 2 DeG. & J. 614, 27 L. J. Ch. 660. [So that, *prima facie*, a British statute is not applicable, even as between British subjects, in a foreign jurisdiction: *Henry v. Stuart*, 14 Phila. (Pa.) 110. See, also, *Bish., Wr. L.*, § 141, citing the following American cases: *U. S. v. Bevans*, 3 Wheat. 336; *U. S. v. Wiltberger*, 5 Id. 76; *U. S. v. Holmes*, Id. 412; *People v. Cæsar*, 1 Parker 645, 7; *Vandeventer v. R. R. Co.*, 27 Barb. (N. Y.) 244; *Bishop v. Barton*, 2 Hun (N. Y.) 436; *Com'th v. Green*, 17 Mass. 515, 540; *Mitchell v. Tibbets*, 17 Pick. (Mass.) 298; *Com'th v. Harris*, 13 Allen (Mass.) 534; *Hildreth v. Heath*, 1 Ill. App. 82; *Hover v. Pa. Co.*, 25 Ohio St. 667; *McCarthy v. R. R. Co.*, 18 Kan. 46. And for application of the same principle to a municipal by-law: *St. Louis Gas Light Co. v. St. Louis*, 46 Mo. 121.

[That, however, a state may pass laws authorizing the doing of certain acts outside of its lim-

read, usually, as if words to that effect had been inserted in them (a). Thus, a woman who married in England, and afterwards married abroad during her husband's life, was not indictable under the Statute of James I. against bigamy; for the offence was committed out of the kingdom, and the Act did not in express terms extend its prohibition to subjects abroad (b). [So, there can be no recovery under a penal statute for an offense committed beyond the territorial jurisdiction of the state.<sup>108</sup> A wager upon a horse-race outside of it is not illegal,<sup>109</sup> and a state law concerning boats and vessels is limited to such as are used in navigating the waters of the state.<sup>110</sup> So, a contract entered into on Sunday, in another state, cannot be declared void except upon proof that the law of the state where it was made rendered it so.<sup>111</sup> Equally well settled is the principle that the power of taxation, however vast in its character and searching in its extent, is necessarily limited to subjects within the jurisdiction of the state;<sup>112</sup> *i. e.*, to persons and property within the same.<sup>113</sup> An act conferring powers upon married women applies only to those who are resident and carrying on business in the state.<sup>114</sup>] The 5 & 6 Will. 4, c. 63, which prohibits the sale of liquors otherwise than by

its, and declaring their effect within the same, see *Chandler v. Main*, 16 Wis. 398.]

(a) *Per* Pollock, C. B., in *Rosseter v. Cahlmann*, 8 Ex. 361; and *per* Cur. in *The Amalia*, 1 Moo. N. S. 471. [A detailed examination of the numerous decisions that apply this principle and define the precise limits of its operation, belongs to a work upon the Conflict of Laws. What follows above may be regarded merely as illustrative.]

(b) 1 Jac. 1, c. 11; 1 Hale P. C. 692.

<sup>108</sup> *Peterson v. Walsh*, 1 Daly (N. Y.) 182.

<sup>109</sup> *Ross v. Green*, 4 Harr. (Del.) 308.

<sup>110</sup> *Noble v. The St. Anthony*, 12 Mo. 261; *Twitchell v. The Missouri*, Id. 412. And see, as to the right to seize liquors in transit through a state: *State v. Cobaugh*, 78 Me. 401.

<sup>111</sup> *Adams v. Gay*, 19 Vt. 358.

<sup>112</sup> *Com'th v. Standard Oil Co.*, 101 Pa. St. 119, at p. 145, *per* Paxson, J., citing *State Tax on Foreign held Bonds*, 15 Wall. 319; *McCulloch v. State*, 4 Wheat. 316; *Maltby v. R. R. Co.*, 52 Pa. St. 146.

<sup>113</sup> *Cleveland, etc., R. R. Co., v. Pennsylvania*, 15 Wall. 300. Real estate is property within the state: see post § 174; but personal property of, such as debt owing to, a non-resident, though by residents, has no situs independent of the domicile of the owner: *Kirtland v. Hotchkiss*, 100 U. S. 491. But see *Mich., etc., R. R. Co. v. Slack*, Id. 595; *U. S. v. Erie Railway*, 106 Id. 327. And see as to money owing by, and evidenced by bonds of, a corporation of the state: *Maltby v. R. R. Co.*, *supra*, disregarding the constitutional question involved.

<sup>114</sup> *Waldron v. Ritchings*, 9 Abb. Pr. N. S. (N. Y.) 359. And see *Hill v. Wright*, 129 Mass. 296. As to divorce laws, see *Addenda*.

imperial measure, would not be considered as affecting a contract between British subjects for the sale of palm oil to be measured and delivered on the coast of Africa (*a*). A different construction would have involved the absurd supposition that the Legislature intended that English subjects should carry English measures abroad (*b*); besides setting aside, by a side-wind, the general principle that the validity of a contract is determined by the law of the place of its performance. Under that general principle, any statute which regulated the formalities and ceremonials of marriage, would, in general, be limited similarly in effect to the territorial jurisdiction of Parliament (*c*).

§ 170. **Exceptions.**—But a different intention may be readily collected from the nature of the enactment. The whole aim and object of the Royal Marriage Act (12 Geo. 3, c. 11), for instance, which was, according to the preamble, to guard against members of the royal family marrying without the consent of the sovereign, and which makes null and void the marriage of every descendant of George II. without the consent of the reigning sovereign, would have been defeated, if a marriage of such a descendant in some place out of the British dominions had not fallen within it. It was accordingly held that the Statute imposed an incapacity, which attached to the person and followed him all over the world (*d*); though the marriage were valid according to the law of the country where it was celebrated (*e*). So, the 5 & 6 Will. 4, c. 54, which declared “all marriages between persons within the prohibited degrees”

(*a*) *Rosseter v. Cahlmann*, 8 Ex. 361.

(*b*) *Per Parke, B.*, *Id.*

(*c*) *Scrimshire v. Scrimshire*, 2 Hagg. Cons. 371, Story, Conf. L., § 121. [A state statute relating to crimes and punishments is not applicable to crimes committed by Indians against each other, while living in their tribal relations, the tribe being recognized and treated as such by the federal government; *State v. McKenney*, 18 Nev. 182. So, whenever in the statutes of any government a general reference is made to *law*, either implicitly or

expressly, it can ordinarily relate only to the laws of the government making such reference: *Houston v. Moore*, 5 Wheat. 1, 43; and the U. S., in passing a statute devolving upon any officers particular powers or duties must, in the absence of any expressions to the contrary, be considered as referring to their own officers alone: *Re Bruni*, 1 Barb. (N. Y.) 187, 209.]\*

(*d*) *The Sussex Peerage*, 11 Cl. & F. 85.

(*e*) *Swift v. Swift*, 3 Knapp, 257.

\* See *Addenda*.



null and void, was held to create a personal incapacity in all British subjects domiciled in the United Kingdom, though married in a country where such marriages are valid (*a*). Where an Englishman, after marrying an Englishwoman in England, became domiciled in America, it was held that he continued subject to the English Divorce Act (*b*).

§ 171. **Presumption against Intent to Exceed Legislative Functions and Powers. Natural Laws.**—[It must, however, be presumed, not only that the Legislature does not intend to exceed its territorial jurisdiction, but that it does not mean to travel beyond its legitimate functions generally. It is a truism to say that the Legislature cannot alter the course of nature."<sup>109</sup> But that it does not intend to do such a thing, is a presumption which may be important in the construction of a statute. "It is beyond even the power of the Legislature" it was said in one case,<sup>110</sup> "to make that a party wall which is not a party wall. No doubt, they might have made provisions to the effect that that which is not a party wall, shall, for the purpose of a particular act of Parliament, be deemed a party wall; but they cannot make what is not a party wall a party wall any more than they can make a square a circle;" and accordingly certain rights were conceded to one of the parties interested in the wall in question, which had been rebuilt under the act and treated as though it were a party

(*a*) *Brook v. Brook*, 27 L. J. Ch. 401; 9 H. L. 193. See *Story*, *Conf. L.*, § 86, and also § 100.

(*b*) *Deck v. Deck*, 29 L. J. P. M. & A. 129; see *Bond v. Bond*, *Id.* 143. This wider effect has been given even to a criminal statute, where such must have been manifestly its intention. The 5 Geo. 4, c. 113, which made it felony for "any persons" to deal in slaves, or to transport them, or equip vessels for their transport, was held to apply to British subjects committing any such offences on the coast of Africa, the notorious scene of the crimes which it was the object of the Act to suppress: *R. v. Zulueta*, 1 Car. & K. 215; *Santos v. Illidge*, 6 C. B. N. S. 841, 28 L. J. 317; overruled on another point, 29 L. J. 348, 8

C. B. N. S. 861; if not in every other part of the world also: See *per Bramwell, B.*, 29 L. J. C. P. 352; though it was not in express terms declared to be applicable abroad. As the Courts of British Colonies were empowered by Act of Parliament to punish certain offences committed at sea with, among other things, transportation, the Act which abolished transportation and substituted penal servitude, was held to extend to the Colonies, though it made no mention of them: 12 & 13 Vict. c. 96; 20 & 21 Vict. c. 3; *R. v. Mount*, L. R. 6 P. C. 283.

<sup>115</sup> *Crow v. Ramsey*, Sir T. Jones, at p. 12.

<sup>116</sup> *Weston v. Arnold*, L. R. 8 Ch. 1084, 1089.

wall, entirely inconsistent with that assumption. So, in the construction of the Pennsylvania married woman's act of 1848 the Supreme Court of that state declared: "It is a radical mistake to suppose that the act intended to convert the wife into a feme sole, so far as relates to her property. That is impossible while she is to continue to discharge the duties of a wife;"<sup>117</sup> and accordingly certain powers were held not to be conferred by the general language of the act which were deemed inconsistent with the existence and incidents of that relation. So again, in construing an act which conferred legitimacy upon illegitimate children whose parents subsequently intermarried so as to render such children capable of inheriting from an ancestor to the same extent as if born in lawful wedlock, whilst it was held that this was within the power of the Legislature, it was said to be "equally true that it is not possible for any Legislature to make that a fact which is not a fact;" and consequently one born out of lawful wedlock, but legitimated under that act, could not, by virtue of it, take by purchase under a limitation in a prior deed of trust to "lawfully begotten" children.<sup>118</sup>

§ 172. **Presumption against Invasion of Judicial Functions.**—

[Nor, ordinarily, will the Legislature be presumed to intend a departure from its own and an invasion of the judiciary's proper functions, by a declaratory act contrary to the construction already put by the courts upon the law thus explained, so as to make the new construction declared applicable to any but future cases.<sup>119</sup>

§ 173. **Presumption against Intent to Bind Future Legislatures.**—

[Nor yet, can the Legislature be presumed to intend an excessive assumption of power, such as would be involved in a design to bind a future Legislature.<sup>120</sup> Consequently, the

<sup>117</sup> *Bear's Adm'r v. Bear*, 33 Pa. St. 525, 528.

<sup>118</sup> *Edwards' App.*, 108 Pa. St. 283, 290.

<sup>119</sup> See this subject more fully discussed, post §§ 291-293.

<sup>120</sup> This cannot be done, except by an act which is, in effect, a contract: *State v. Oskins*, 28 Ind. 369; *Swift v. Newport*, 7 Bush

(Ky.) 37; *Gilleland v. Schuyler*, 9 Kan. 569; *Files v. Fuller*, 44 Ark. 273. Any departure, by a subsequent Legislature from a rule enacted by a prior one operates as an implied repeal thereof: see *Kellogg v. Oshkosh*, 14 Wis. 623; *Brightman v. Kirner*, 22 Id. 54. *Wall v. State*, 23 Ind. 150; *infra*, n. 123. See *Addenda*.

word "forever," in a statute, not amounting to a contract, is to be understood as meaning simply until changed by law.<sup>121</sup> So the provision in a general repealing act, that "no offence committed or penalty incurred previous to the time when any statutory provision shall be repealed, shall be affected by such repeal," was construed as relating solely to the acts repealed by that act, and to have no respect to subsequent legislation, it being held to be beyond the power of the Legislature to declare, in advance, the intent of subsequent legislation or its effect upon existing statutes.<sup>122</sup> And a provision restricting counties, etc., from issuing bonds in aid of the construction of a railroad "by virtue of the authority of any other law of this state," was held not to refer to any future enactments.<sup>123</sup>

§ 174. **Presumption against Violation of International Law. Treaties.**—Under the same general presumption that the Legislature does not intend to exceed its jurisdiction, every statute is to be so interpreted and applied, as far as its language admits, as not to be inconsistent with the comity of nations, or with the established rules of international law (*a*). If, therefore, it designs to effectuate any such object, it must express its intention with irresistible clearness, to induce a Court to believe that it entertained it; for if any other construction is possible, it would be adopted, in order to avoid

<sup>121</sup> See *Casey v. Harned*, 5 Iowa, 1. Hence a general act providing a method for the change of county seats is not repealed by a special and temporary act for that purpose relating to a single county, although the latter declared that the place selected under it should, forever, be the county seat thereof: *Ibid*.

<sup>122</sup> *Mongeon v. People*, 55 N. Y. 613. Even a general act saving actions, etc., under repealed statutes is, in *Files v. Fuller*, 44 Ark. 273, 280, said to have very little importance save in hermeneutics, no Legislature having the power to prescribe to courts rules of interpretation, or to fix as to future Legislatures any limits of power as to the effect of their action; whilst, on the other hand, the retention of such a statute by a subsequent Leg-

islature is admitted to be persuasive that that Legislature meant to act in harmony with it. See § 484, n.

<sup>123</sup> *Oleson v. R. R. Co.*, 36 Wis. 383. The passage of any subsequent statute conflicting with it, would repeal it pro tanto: *Ibid*.

(*a*) *Per* Maule, J., in *Leroux v. Brown*, 12 C. B. 801, 23 L. J. C. P. 3; *Bluntschli*, *Voelkerrecht*, s. 847; *per* Dr. Lushington in *The Zollverein*, Swab. 98, and *The Annapolis*, Lush. 295. [As to the states of the Union, "while recognizing the central federal authority, resulting from the Constitution of the United States, they hold in regard to each other, with the exception of the cases governed by that instrument, the position of independent and foreign powers." *Sedgw. p. 60.*]

imputing such an intention to the Legislature (a). All general terms must be narrowed in construction to avoid it (b). For instance, although foreigners are subject to the criminal law of the country in which they commit any breach of it, and also, for most purposes to its civil jurisdiction, a foreign sovereign, an ambassador, the troops of a foreign nation, and its public property are, by the law of nations, not subject to them (c), and statutes would be read as tacitly embodying this rule. So, it is an admitted principle of public law, that, except as regards pirates *jure gentium*, and, perhaps, nomadic races and savages who have no political organization (d), a nation has no jurisdiction over offences committed by a foreigner out of its territory, including its ships and waters as already mentioned (e); and the general language of any criminal statute would be so restricted in construction as not to violate this principle. Thus, the 9 Geo. 4, c. 31, s. 8 (re-enacted by the 24 & 25 Vict. c. 100, s. 10), which enacted that when any person, feloniously injured abroad or at sea, died in England, or receiving the injury in England, died at sea or abroad, the offence should be dealt with in the country where the death or injury occurred, would not authorize the trial of a foreigner who inflicted a wound at sea in a foreign ship, of which the sufferer afterwards died in England (f). So, it has been repeatedly decided in America that an Act of Congress which

(a) *Per Cur.* in *U. S. v. Fisher*, 3 Cranch, 390, and *Murray v. Charming Betsy*, *Id.* 118.

(b) *Per* Lord Stowell in *Le Louis*, 2 Dods. 229.

(c) Wheat. *Elem. Int. L.*, pt. 2, c. 2; and see the cases collected in *The Parlement Belge*, 5 P. D. 197; *The Constitution*, 4 P. D. 39, 48 L. J. 13.

(d) See ex. gr. *Ortolan*, *Dipl. de la Mer*, i. 285. By the 34 Vict. c. 8, offences committed within twenty miles from our West African Settlements on British subjects, or residents within those settlements by persons not the subjects of any civilized power, are made cognizable by the Superior Courts of the Settlements.

(e) *Sup.* § 169. See Wheaton's

*Elem. Internat. L.* pt. 2, c. 2, s. 9; *The Parlement Belge*, 5 P. D. 197; *R. v. Anderson*, L. R. 1 C. C. 161; *R. v. Seberg*, *Id.* 264; *R. v. Carr*, 10 Q. B. D. 76; *R. v. Lopes*, 1 D. & B. 525, 27 L. J. M. C. 48; *R. v. Sattler*, *Id.*; *R. v. Lesley*, 1 Bcll, 220, 29 L. J. M. C. 97. See as to ships, the judgment of Lindley, J., in *R. v. Keyn*, 2 Ex. D. 93, 94.

(f) *R. v. Lewis*, *Dears. & B.* 182; and see *R. v. Depardo*, 1 Taunt. 26; *R. v. De Mattos*, 7 C. & P. 458; *Nga Hoong v. R.*, 7 Cox, 489; *R. v. Bjornsen*, 34 L. J. M. C. 180. The 267th section of the *Merc. Shipping Act* of 1854, would seem for this reason limited to British subjects; and sect. 527; *Harris v. Franconia*, 2 C. P. D. 173.

enacted that any person committing robbery in "any vessel on the high seas" should be guilty of piracy, applied only to robbery in American vessels, and not to robbery in foreign vessels even by an American citizen (*a*).

So, as it is a rule of all systems of law that real property is exclusively subject to the laws of the State within whose territory it lies, [to the extent of making it properly taxable therein, though its owner be a foreigner,<sup>124</sup>] any Act which dealt in general terms with the real estate of a bankrupt or lunatic, for instance, would be construed as not extending to his lands abroad (*b*).

It being also a general principle that personal property has, except for some purposes, such as probate (*c*), no other situs than that of its owner; the right and disposition of it are governed by the law of the domicile of the owner, and not by the law of their local situation (*d*). Where an Act imposes a burden in respect of personal property, it would be construed, as far as its language permitted, as not intended to contravene the general principle (*e*). Thus, the 36 Geo. 3, c. 52, which imposed a duty on "every legacy given by any will of any person out of his personal estate," and the Succession Duty Act, 16 & 17 Vict. c. 51, which imposes a duty on every "disposition of property" by which "any person" becomes "entitled to any property on the death of another," was held not to apply where the deceased was a

(*a*) U. S. v. Howard, 3 Wash. 340; U. S. v. Palmer, 3 Wheat. 610; U. S. v. Klintock, 5 Wheat. 144; U. S. v. Kessler, Bald. 15, cited by Cockburn, C. J., in R. v. Keyn, 2 Ex. D. 172.

<sup>124</sup> Maltby v. R. R. Co., 52 Pa. St. 146.

(*b*) Selkrig v. Davies, 2 Rose, 311, 2 Dow. 250; Cockerell v. Dickens, 3 Moo. P. C. 133. See also Sill v. Worswick, 1 H. Bl. 665; Phillips v. Hunter, Id. 402; Hunter v. Potts, 4 T. R. 182; *Re* Blithman, L. R. 1 Eq. 23; Freke v. Carbery, 16 Eq. 461; Waite v. Bingley, 21 Ch. D. 674; Story, Conf. L., §§ 428, 551, &c.

(*c*) And see Hart v. Herwig, L. R. 8 Ch. 860.

(*d*) Story, Conf. L., § 376. [See ante, note 113.]

(*e*) See ex. gr. Grenfell v. Inland Rev. Com., 1 Ex. D. 242. [But although the general rule is that the place of sale of personal property is the point at which the goods ordered are set apart and delivered to the purchaser, or to a common carrier, who, for the purposes of delivery, represents him: *Garbracht v. Com'th*, 96 Pa. St. 449: it was held in *State v. Ascher*, 54 Conn. 229, Park, C. J., diss., that a Connecticut act forbidding all persons without license to sell intoxicating liquors "by sample, or soliciting or procuring orders," was violated by a contract, made in Connecticut by a traveling agent of a firm of another state, for the sale of liquors to be delivered in the latter. Compare, however, *Garbracht v. Com'th*, supra; and § 454.]

foreigner, or even a British subject domiciled abroad, though the property was in England (*a*). But they would affect personal property abroad, if the deceased was domiciled in England, though a foreigner (*b*). [So, under the Pennsylvania act imposing a collateral inheritance tax upon all estates passing from any person who may die seized or possessed of such estate, being within the commonwealth, by will or under the intestate laws, it was held, that, when neither the personal property nor the domicile of its owner, though born a citizen of Pennsylvania, but settled elsewhere, is within the state at the time of his death, it is not subject to the duty, although he expressed a desire, complied with by his executor, to be buried in the land of his birth.<sup>126</sup> Nor is personal property, *e. g.*, bonds, deposited by one who is a citizen of another state and domiciled there, with a trust company in Pennsylvania, liable to the tax.<sup>126</sup> But the personalty of a citizen of Pennsylvania, derived either from within or without the state, is liable.<sup>127</sup> Not so, however, his real estate situated in another state.<sup>128</sup>]

§ 175. It is hardly necessary to add, however, that, if the language of an Act of Parliament, unambiguously and without reasonably admitting of any other meaning, applies to foreigners abroad, or is otherwise in conflict with any principle of international law, the Courts must obey and administer it as it stands, whatever may be the responsibility incurred by the nation to foreign powers in executing such a law (*c*). [Even in the case of treaties,

(*a*) *In re Bruce*, 2 Cr. & J. 436; *Arnold v. Arnold*, 2 M. & Gr. 256; *Thomson v. The Adv.-Genl.*, 12 Cl. & F. 1; *Wallace v. The Atty.-Genl.*, L. R. 1 Ch. 1; *Hamilton v. Dallas*, 1 Ch. D. 257. See also *Udney v. East India Co.*, 13 C. B. 733, 22 L. J. 260; *Erichsen v. Last*, 50 and 51 L. J. Q. B. 570 and 86; *Cesena Sulphur Co. v. Nicholson*, 1 Ex. D. 428; *Calcutta Jute Co. v. Nicholson*, Id.; *Sully v. Atty.-Genl.*, 5 H. & N. 710, 29 L. J. 464; *Re Atkinson*, 21 Ch. D. 100. *Comp. the Atty.-Genl. v. Campbell*, L. R. 5 H. L. 524; *Re Cigala's Settlement*, 7 Ch. D. 351, 47 L. J. 166; *Re Atkinson*, 51 L.

J. Ch. 452.

(*b*) *Atty.-Genl. v. Napier*, 6 Ex. 217.

<sup>126</sup> *Hood's Est.*, 21 Pa. St. 106.

<sup>126</sup> *Orcutt's App.*, 97 Pa. St. 179; *Comp. Com'th v. Smith*, 5 Id. 142.

<sup>127</sup> *Short's Est.*, 16 Pa. St. 68.

<sup>128</sup> *Drayton's App.*, 61 Pa. St. 172; *Com'th v. Coleman's Adm'r*, 52 Id. 468; nor his personalty in another State, his debts there exceeding it in amount; *Ib.*

(*c*) *Per Cur. in The Marianna Flora*, 11 Wheat. 40; *The Zollverein*, Swab. 96; *The Johannes*, Id. 188, 30 L. J. P. M. & A. 94; *The Amalia*, 32 L. J. P. M. & A. 193. As to the Hovering Acts (39

although laws are to be construed, if it be possible to do so without violence to their language, so as to conform with the provisions of such,<sup>129</sup> yet the construction which the Legislature puts upon them by statute is binding upon the courts. "However individual judges might construe a treaty, it is the duty of the court to conform itself to the will of the Legislature, if that will has been clearly expressed; the courts cannot pronounce the course of their own nation erroneous."<sup>130</sup>]

§ 176. **Rights, etc., of Foreigners. Remedies.**—It may be added, in connection with this topic, that, as regards the question how far statutes which confer exceptional rights or privileges are to be construed as extending to foreigners abroad, the authorities are less clear. It has been said, indeed, that when personal rights are conferred, and persons filling any character of which foreigners are capable are mentioned, foreigners would be comprehended in the statute (*a*). On the other hand, it has been laid down that, in general, statutes must be understood as applying to those only who owe obedience to the legislature which enacts them, and whose interests it is the duty of that legislature to protect; that is, its own subjects, including in that expression, not only natural born and naturalized subjects, but also all persons actually within its territorial jurisdiction; but that as regards aliens resident abroad, the legislature has no concern to protect their interests, any more than it has a legitimate power to control their rights (*b*). In this view, it would be presumed, in interpreting a statute, that the legislature did not intend to legislate either as to their

& 40 Vict. c. 179, embodying the 16 & 17 Vict. s. 212), see *Le Louis*, 2 Dods. 245; *Church v. Hubbard*, 2 Cranch, 187. See also 2 & 3 Vict. c. 73.

<sup>129</sup> *U. S. v. 43 gal's of Whisky*, 108 U. S. 491.

<sup>130</sup> *Foster v. Neilson*, 2 Pet. 253, 307. And see *The Cherokee Tobacco*, 11 Wall. 617. But that rights acquired by treaty cannot be affected by Acts of Congress, see *Wilson v. Wall*, 34 Ala. 288; *S. C.* 6 Wall. 83; nor treaty rights

of Indians by State legislation: *Fellows v. Denniston*, 23 N. Y. 420.

(*a*) *Per Maule, J.*, in *Jefferys v. Boosey*, 4 H. L. 895.

(*b*) See *per Jervis, C. J.*, in *Jefferys v. Boosey*, 4 H. L. 946; *per Lord Cranworth*, Id. 955; *per Wood, V. C.*, in *Cope v. Doherty*, 4 K. & J. 357, 27 L. J. Ch. 601; *Comp. per Lord Westbury* in *Routledge v. Low*, L. R. 3 H. L. 100.

rights or liabilities; and to warrant a different conclusion, the words of the statute ought to be express, or the context of it very clear (*a*). On this principle, mainly, it was held that the Act of Anne, which gave a copyright of fourteen years to "the author of any work," did not apply to a foreign author resident abroad (*b*). The decision would probably have been different if the author had been in England when his work was published (*c*). The later Act, 5 & 6 Vict. c. 45, which does not appear to differ materially, as regards this question, from that of Anne, was held to protect a foreign author who was in the British dominions at the time of publication (*d*). It was held also that a foreigner was entitled to maintenance, and to gain a settlement under the poor laws (*e*). And it was decided in the Court of Admiralty that the 9 & 10 Vict. c. 93, which gives a right of action to the personal representative of a person killed by a wrongful and actionable act or neglect, extended to the representative of a foreigner who had been killed on the high seas, in a foreign ship, in collision with an English vessel (*f*). [And it has been held in Georgia, that, where a Georgia railway company ran its road into Alabama, and there killed a man, the Alabama administrator might bring suit in Georgia.<sup>181</sup> A resident alien has been held capable of becoming a corporator and trustee in a religious corporation;<sup>182</sup> of enlisting in the United States Army;<sup>183</sup> of voting

(*a*) *Per* Turner, L. J., in *Cope v. Doherty*, 27 L. J. Ch. 609, 2 De G. & J. 624.

(*b*) 8 Anne, c. 19; *Jefferys v. Boosey*, 4 H. L. 815; *dubitante* Lord Cairns in *Routledge v. Low*, L. R. 3 H. L. 100.

(*c*) *Per* Lord Cranworth, in *Jefferys v. Boosey*, *ubi sup.*

(*d*) *Routledge v. Low*, L. R. 3 H. L. 100.

(*e*) *R. v. Eastbourne*, 4 East, 103. [Compare, however, *Knox v. Waldborough*, 3 Me. 455; *Jefferson v. Litchfield*, 1 Id. 196.]

(*f*) *The Gulfaxe*, L. R. 2 Ad. & Ec. 325; *The Explorer*, L. R. 3 Ad. & Ec. 289.

<sup>181</sup> *Central R. R. Co. v. Swint*, 73 Ga. 651. And it has been repeatedly held, that, where the

statutes of two states give actions against railroad companies for negligence, suit may be brought in one state having jurisdiction over the railroad company, for an injury done by it in another; see *Morris v. Ry. Co.*, 65 Iowa, 727; *Knight v. R. R. Co.*, 108 Pa. St. 250. *Comp. Whitford v. R. R. Co.*, 98 N. Y. 377; *Richardson v. R. R. Co.*, 98 Mass. 85; *Allen v. R. R. Co.*, 45 Md. 41; *R. R. Co. v. Lacey*, 43 Ga. 461.

<sup>182</sup> *Cammeyer v. United, etc., Churches*, 2 Sandf. Ch. (N. Y.) 186.

<sup>183</sup> *Coats v. Holbrook*, Id. 586; 11 Paige, 292; *U. S. v. Cottingham*, 1 Rob. (Va.) 615. In *Greenheld v. Morrison*, 21 Iowa, 538, it was held that a non-resident alien's



for corporate or borough officers ;<sup>134</sup> and a foreigner residing in the state is not within the statute requiring non-residents to give security for costs in actions brought by them, unless such residence is shown to be merely temporary.<sup>135</sup>

§ 177. The nature and measure of legal remedies are governed by the *lex fori* ; and it is no breach of international law, or any interference with the rights of foreigners, to determine what redress is to be given to suitors who resort to our Courts (*a*). [So, although it is conceded that the statutes of the various states relating to the property and powers of married women govern as to the property acquired under them,<sup>136</sup> and the validity of contracts entered into under them<sup>137</sup> so that, *e. g.*, property acquired in England and brought to New York by a married woman, was held governed by the English law,<sup>138</sup> and a married woman's liability under the statutes of Illinois, upon her contract of suretyship for her husband's debts, there made, was held enforceable in New Jersey, where such contracts are prohibited,<sup>139</sup>—yet a married woman domiciled in another state, and by the laws thereof holding property to her separate use, in seeking a remedy to recover for loss or injury thereto in New York, was held governed by the laws thereof, and consequently entitled to sue in her own name.<sup>140</sup>

capacity to take a distributive share of an intestate's personal property was unaffected by an act providing that personal property should be distributed to the same persons and in the same proportions as though it were real estate.

<sup>134</sup> *Com'th v. Woelper*, 3 Serg. & R. (Pa.) 29; *Stewart v. Foster*, 2 Binn. (Pa.) 110, 120.

<sup>135</sup> *Norton v. MacKie*, 15 N. Y. Supr. Ct. 520.

(*a*) *The Amalia*, *ubi sup.*; *The Vernon*, 1 W. Rob. 316; *Bank of U. S. v. Donnally*, 8 Peters 361. See *Jackson v. Spittall*, L. R. 5 C. P. 542; *Re Haney's Trusts*, L. R. 10 Ch. 275; *Chartered Merc. B'k v. Netherlands, etc.*, *Steam Nav. Co.*, L. R. 10 Q. B. D. 521.

<sup>136</sup> See *King v. O'Brien*, 33 N. Y. Supr. Ct. 49; *McCormick v. R.R. Co.*, 49 N. Y. 303; *King v. Martin*, 67 Ala. 177; *Gluck v. Cox*, 75 Id.

310; *Davis v. Zimmerman*, 67 Pa. St. 70; *Meyer v. McCabe*, 73 Mo. 236.

<sup>137</sup> *Wright v. Remington*, 41 N. J. L. 48.

<sup>138</sup> *King v. O'Brien*, 33 N. Y. Supr. Ct. 49.

<sup>139</sup> *Wright v. Remington*, 41 N. J. L. 48.

<sup>140</sup> *Stoneman v. R. R. Co.*, 52 N. Y. 429. But see *King v. Martin*, 67 Ala. 177, where the right of a married woman to sue alone under the laws of the state for the recovery of her separate estate seems to be held confined to that created by those laws, her husband being deemed a proper party plaintiff in a suit for the recovery of her interests under the laws of another state. Under the New York Code of Civ. Proced. a foreign debtor brings with him the protection of his home statute of limitations: *Howe*

§ 178. **Presumption against Intent to Violate Constitution.**—[A presumption of much importance in this country, but, of course unknown in England, where the courts cannot question the authority of Parliament, or assign any limits to its power,<sup>141</sup> is that a legislative intent to violate the constitution is never to be assumed, if the language of the statute can be satisfied by a contrary construction.<sup>142</sup> The application of this rule requires, that, wherever a statute is susceptible of two constructions, of which the one would make it unconstitutional, the other constitutional, the latter is to be adopted.<sup>143</sup> Where the language of an act will bear two constructions equally obvious that which upholds its constitutionality, *i. e.*, that which is in accordance with the provisions of the constitution, is, of course, to be preferred ;<sup>144</sup> as, where the language of an act might be construed to operate in *præsent*i, in which case it would be unconstitutional, or, in *futuro*, in which case the act would be constitutional, the latter construction was held to be imperative.<sup>145</sup> Equally so would be a construction, if the act will bear it, giving it a prospective, to the exclusion of a retrospective, operation, where the latter would render it unconstitutional.<sup>146</sup> Upon this principle, a statute declaring that a trust shall be deemed to be discharged after the lapse of 25 years may, if necessary to sustain its constitutionality, be construed as making the lapse of that period *prima facie* or presumptive evidence that the trust has been discharged, and permitting this presumption to be rebutted by other evidence.<sup>147</sup> Where an unconstitutional effect would be the

*v. Welch*, 3 How. Pr., N. S. (N. Y.) 465.

<sup>141</sup> See 1 Kent, Comm. \* 447; *Bonham's Case*, 8 Rep. 118a; *Day v. Savay*, Hob. 87; *London v. Wood*, 12 Mod. 688.

<sup>142</sup> *N. Y., etc., R. R. Co. v. Van Horn*, 57 N. Y. 473; *French v. Teschmaker*, 24 Cal. 518; *Atty.-Gen. v. Eau Claire*, 37 Wis. 400; *Brown v. Buzan*, 24 Ind. 194; *Slack v. Jacob*, 8 W. Va. 612.

<sup>143</sup> *Roosevelt v. Godard*, 53 Barb. (N. Y.) 533; *Colwell v. May's Landing, etc., Co.*, 19 N. J. Eq. 245; *Duncombe v. Prindle*, 12 Iowa, 1; *Iowa, etc., Co. v. Webster Co.*,

21 Id. 221; *Com'th v. Bennett*, 16 Serg. & R. (Pa.) 243. See also *Mardre v. Felton*, Phil. L. (N. C.) 279; *McGwigon v. R. R. Co.*, 95 N. C. 428.

<sup>144</sup> *Grenada Co. v. Brogden*, 112 U. S. 261.

<sup>145</sup> *Palms v. Shawano Co.*, 61 Wis. 211.

<sup>146</sup> *Chicago, etc., R. R. Co., v. Pounds*, 11 Lea (Tenn.) 127.

<sup>147</sup> *Kip v. Hirsch*, 18 Abb. N. C. (N. Y.) 167. See *Lathrop v. Dunlop*, 4 Hun (N. Y.) 213; *S. C. 63 N. Y. 610*; *Walker v. Hall*, 34 Pa. St. 483-486.

result of a strict or narrow construction, a broad or liberal one is commanded. Thus, where the constitutionality of an act depends upon the construction of its language in a strict legal meaning, which would have the effect of limiting and destroying, whilst some other, popular acceptance would support, the act, the latter must be adopted.<sup>148</sup> Thus the phrase "owner of a vehicle" was extended to embrace the person in mediate or immediate control thereof, whether he was the actual owner or not, in order to prevent the provisions of the act, which prescribed a penalty of treble damages, from operating as a taking of one person's property for the acts of another over whom he had no control.<sup>149</sup> Similarly a law speaking of officers by their titles of office, without words limiting its operation to the individuals in office at the date of its passage, will be presumed to be intended to operate upon future incumbents also, in order to escape the objection of unconstitutionality as a private or local law.<sup>150</sup>

§ 179. **Restriction of Language to Conform with Constitution.**—[On the other hand, "it is a safe and wholesome rule to adopt the restricted construction of a statute, when a more liberal one will bring us in conflict with the fundamental law";<sup>151</sup> indeed to regard as excepted by necessary implication from even the most express and absolute general provisions, all cases to which a statute cannot constitutionally apply.<sup>152</sup>

§ 180. **Limits of Rule.**—[But the rule above stated does not warrant the avoidance of unconstitutionality in a statute by forcing upon its language, under construction, a meaning, which, upon a fair test, is repugnant to its terms.<sup>153</sup> Where the language will not fairly bear a construction consistent with the constitution, the courts can only refuse to enforce the act.<sup>154</sup>

<sup>148</sup> *Com'th v. Butler*, 99 Pa. St. 535, 540; *F. & M. Bank v. Smith*, 3 Serg. & R. (Pa.) 63; *Monongahela Nav. Co. v. Coons*, 6 Watts & S. (Pa.) 101.

<sup>149</sup> *Camp v. Rogers*, 44 Conn. 291; see ante § 96.

<sup>150</sup> *Seneca Co. v. Allen*, (N. Y.) 1 Cent. Rep. 71.

<sup>151</sup> *Sedgw.* pp. 266-7, cit. *People v. B'd of Education*, 13 Barb. (N.

Y.) 400, 409. See also *Com'th v. Butler*, supra, at p. 541.

<sup>152</sup> *Op. of Justices*, 41 N. H. 553.

<sup>153</sup> *French v. Teschemaker*, 24 Cal. 518; and see *People v. R. R. Co.*, 35 Id. 606; *Bigelow v. R. R. Co.*, 27 Wis. 478; *Bish., Wr. L.*, § 90, cit. in addition, *Bailey v. R. R. Co.*, 4 Harr. (Del.) 389.

<sup>154</sup> *Atty-Gen. v. Eau Claire*, 37 Wis. 400. Compare the decision

§ 181. **Statute and Constitution Construed Together.**—[It has already been said<sup>156</sup> that a statute must be construed together with a constitutional provision in *pari materia*.<sup>156</sup> No departure from the constitution can be assumed to be intended by the Legislature. Hence the meaning of language used in a statute must be understood to conform with, and be construed with reference to, the intention expressed upon the same subject-matter by the constitution; and the provisions of a statute must be understood, on the one hand, as silently embracing those prescribed before or after its passage, by the constitution, or, on the other hand, stopping short of that for which the latter has made other provision. Thus, where the constitution made all the stockholders in corporations chartered under the laws of the state subject to a certain individual liability for all stock "owned" by them, a statute under which a corporation was organized, and which provided for such personal liability of stockholders in respect of stock subscribed by them, was held to impose the burden not only in respect of stock subscribed for, but also of stock distributed as a stock dividend, and not only upon an original subscriber, but also upon a transferee or pledgee of the stock as collateral security.<sup>157</sup> Again, the word "dam" in the charter of a corporation was construed, not in its strict sense as a structure raised to obstruct the flow of water, but in its more conventional meaning as the pond of water itself created by such obstruction, since the former significance, in a provision allowing the company to raise its "dam," but providing no compensation for injury to others, would have violated the constitution.<sup>158</sup> And in

in the legal tender case, *Hepburn v. Griswold*, 8 Wall. 603. For the effect of legislation upon the construction of constitutional provisions, in order to harmonize the two, see post, § 528. It may be here added that every doubt as to constitutionality of an act is to be resolved in its favor: *Com'th v. Butler*, 99 Pa. St. 535; *Crowley v. State*, 11 Oreg. 512; *Smithie v. Garth*, 33 Ark. 17; *Alexander v. People*, 7 Col. 155; *Slack v. Jacob*, 8 W. Va. 612. Similarly, unless what an ordinance says is necessa-

rily repugnant to the municipal charter, it ought not to be held to be so intended: *Shaw v. Macon*, 21 Ga. 280.

<sup>155</sup> Ante, § 57.

<sup>156</sup> *Eskridge v. State*, 25 Ala. 30; *Banger's App.*, 109 Pa. St. 79; *Aultman's App.*, 98 Id. 505; *Johnson's Case*, 1 Greenl. (Me.) 230; *Billingsley v. State*, 14 Md. 369; *Bish., Wr. L.*, § 89.

<sup>157</sup> *Aultman's App.*, 98 Pa. St. 505.

<sup>158</sup> *Colwell v. May's Landing etc., Co.*, 19 N. J. Eq. 245.

view of a constitutional provision that no statute should take effect until ninety days after its passage, except in case of emergency, the phrase "after the passage of the act," in a statute directing certain matters "within ninety days after the passage of the act," was held to mean within that period after the going into effect of the enactment.<sup>109</sup> Further, to conform with a constitutional provision that "in all criminal prosecutions, the accused shall have a right . . . to have a speedy . . . trial . . . by a jury," etc., it was held, that, under an act giving justices of the peace the right to try without the intervention of a jury, and sentence for certain offences, the accused must be held entitled to an appeal to a court where a trial by jury might be had.<sup>100</sup> And where an act passed in 1841 imposed certain duties in the collection of revenue upon the state treasurer and made his account and certificate of amount due evidence against collectors, and subsequently the constitution imposed upon the Comptroller many of the duties formerly devolving on the Treasurer, among them that of "superintending and enforcing the collection of all taxes and revenue, adjusting, settling and preserving all public accounts," etc., it was held that his account and certificate were evidence in actions against collectors under the provisions of the act of 1841.<sup>101</sup> And finally, the ultimate right to decide upon the claim of any person to sit as a member of either house of the Legislature, being held to rest, under the constitution, with that body, in interpreting an act providing for the trial and determination of contested elections by the court of common pleas of the proper county, the duty being imposed upon it to decide which candidate had received the highest number of votes and was entitled to a certificate of election, it was held that the power of the court ended there, and that it could enter no judgment or decree declaring which claimant was entitled to the office, that right belonging to the Legislature, which remained at liberty, in the ultimate disposition of the matter, to reject every finding of fact or law made by the court.<sup>102</sup>

<sup>109</sup> *Harding v. People* (Col.), 15 Pacif. Rep. 727.

<sup>100</sup> *Johnson's Case*, 1 Greenl. (Me.) 230.

<sup>101</sup> *Billingsley v. State*, 14 Md. 369.

<sup>102</sup> *Re Contested El'n of McNeill*, 11 Pa. St. 235.

## CHAPTER VII.

## PRESUMPTION AGAINST INCONSISTENCY. REPEAL BY IMPLICATION.

- § 182. Legislature Presumed to Know the Law and to be Consistent.
- § 183. Repugnant Clauses in Same Act.
- § 184. Exceptions. Saving Clause. Proviso.
- § 186. Construction of Proviso, etc.
- § 187. Repugnant Acts passed at Different Sessions.
- § 188. Repugnant Acts passed at Same Session.
- § 189. Acts Passed Same Day.
- § 191. Constitutional Requisites as to Repeal Inapplicable to Implied Repeal.
- § 192. Repeal by Unconstitutional Act.
- § 193. When Later Act does not Repeal Earlier Repugnant Act.
- § 194. Re-enactments.
- § 195. Amendments.
- § 196. Amendments "so as to read," etc.
- § 197. Repugnancy in Schedule.
- § 198. Implied Repeal by Negative Statutes.
- § 199. Implied Negative in Affirmative Statutes.
- § 200. Statutes Intended to Furnish Exclusive Rule.
- § 201. Revisions and Codifications.
- § 203. Qualifications of Foregoing Rules.
- § 204. Implied Repeal of Common Law.
- § 205. Limits of Extent of Repeal by Implication.
- § 206. Expressed Intention to Repeal.
- § 207. Acts conferring Conflicting Rights, etc.
- § 208. Effect of Inconvenience and Incongruity between Acts.
- § 209. Effect of Later Legislation as Showing Intent to Repeal.

§ 182. **Legislature Presumed to Know the Law and to be Consistent.**—An author must be supposed to be consistent with himself; and, therefore, if in one place he has expressed his mind clearly, it ought to be presumed that he is still of the same mind in another place, unless it clearly appears that he has changed it (*a*). In this respect, the work of the

(*a*) Puff. L. N. b. 5, c. 12, s. 9.

Legislature is treated in the same manner as that of any other author. [As it is the function of the Legislature to express the national will by means of statutes, it is essential that the Legislature should know what is the existing state of the law whenever any statute is passed, and it is always presumed that the Legislature possesses such knowledge.<sup>1</sup>] The language of every enactment must be so construed, as far as possible, as to be consistent with every other which it does not in express terms modify or repeal. The law, therefore, will not allow the revocation or alteration of a statute by construction when the words may have their proper operation without it (*a*), [but requires the courts "to uphold the prior law, if the two acts may well subsist together."<sup>2</sup> Yet, "it is not in accordance with settled rules of construction to ascribe to the law-making power an intention to establish conflicting and hostile systems upon the same subject, or to leave in force provisions of law by which the later will of the Legislature may be thwarted and overthrown. Such a result would render legislation a useless and idle ceremony, and subject the law to the reproach of uncertainty and unintelligibility."<sup>3</sup>] It is impossible to will contradictions; and if two passages are irreconcilable, the earlier stands impliedly repealed by the latter (*b*). *Leges posteriores priores contrarias abrogant. Ubi duæ contrariæ leges sunt, semper antiquæ obrogat nova* (*c*). ["Of course, subsequent legislation repeals previous inconsistent legislation, whether it expressly says so or not. In the nature of things it would be so, for contradictions cannot stand together."<sup>4</sup>

<sup>1</sup> Wilb., Stat. L., at pp. 12, 13, citing *R. v. Walford*, 9 Q. B., at p. 635; *Jones v. Brown*, 2 Exch., at p. 332. "Laws are presumed to be passed with deliberation, and with full knowledge of all existing ones on the subject." Sedgw., at p. 106; and to same effect: *Howard Association's App.*, 70 Pa. St. 344, 346; and of the common law: *Jones v. Dexter*, 8 Fla. 276, 286.

(*a*) *Per* Bridgman, C. J., in *Wyn v. Lyn*, Bridg. Rep. by Bannister, 117.

<sup>2</sup> Sedgw., at p. 106, citing:

*Bowen v. Lease*, 5 Hill (N. Y.) 221; *Canal Co. v. R. R. Co.*, 4 Gill and J. (Md.) 1. Post, §§ 210, et seq.

<sup>3</sup> *Lyddy v. Long Island City*, 104 N. Y. 218.

(*b*) *Co. Litt.* 112; *Shep. Touchst.* 88; *Grot. b. 2, c. 16, s. 4*; *Sims v. Doughy*, 5 Ves. 243; *Constantine v. Constantine*, 6 Ves. 100; *Morrall v. Sutton*, 1 Phil. 533; *Brown v. G. W. R. Co.*, 9 Q. B. D. 753, *per* Field, J.

(*c*) *Livy*, b. 9, c. 34.

<sup>4</sup> *Re Hickory Tree Road*, 43 Pa. St. 139, 142.

§ 183. **Repugnant Clauses in Same Act.**—[Where, in a statute, there are several clauses which present, as compared with each other, an irreconcilable conflict, the one last in order of date or local position must, in accordance with this rule, prevail, and the others be deemed abrogated to the extent of such repugnancy; whether the conflicting clauses be sections of the same act, or merely portions of the same section.<sup>5</sup> But this rule is subject to some modifications. Thus it has been said, that a later clause which is obscure and incoherent will not prevail over an earlier one which is clear and explicit.<sup>6</sup> Nor, as a statute is to be construed with reference to other statutes in *pari materia*, as well as by a general survey of the whole context, and as the various provisions are to be made to stand together if possible, will such be the result, where, upon a comparison of the entire act with others upon the same subject, there appearing no intention to change the general scheme or system of legislation upon the same, the earlier provision harmonizes and the latter conflicts with such statutes.<sup>7</sup> And it has been seen that a reading of the provisions of the whole statute together may give to earlier sections the effect of restricting the meaning of later ones, as well as to the latter the effect of restricting the operation of the former.<sup>8</sup> As to repugnant portions of a code it has been held that the sections last adopted,<sup>9</sup> or portions transcribed from later statutes,<sup>10</sup> must be deemed to repeal sections adopted earlier or transcribed from earlier statutes, or so to modify them as to produce an agreement between them.

§ 184. **Exceptions. Saving Clause. Proviso.**—[It seems proper, in this connection to examine the effect of exceptions,

<sup>5</sup> See *Harington v. Rochester*, 10 Wend. (N. Y.) 547; *Comm'l B'k v. Chambers*, 16 Miss. 9; *Packer v. R. R. Co.*, 19 Pa. St. 211; *Brown v. Comm'rs*, 21 Id. 37, 42; *Quick v. White Water Tp.*, 7 Ind. 570; *Ryan v. State*, 5 Neb. 276; *Albertson v. State*, 9 Id. 429; *Sams v. King*, 18 Fla. 557; *Branagan v. Dulaney*, 8 Col. 408. And compare, *Gee v. Thompson*, 11 La. An. 657; *Peet v. Nalle*, 30 Id. P. II.

949; *Hamilton v. Buxton*, 6 Ark. 24.

<sup>6</sup> *State v. Williams*, 8 Ind. 191.

<sup>7</sup> *Kans. Pac. Ry. Co. v. Wyandotte*, 16 Kan. 587; ante, § 44, note 84.

<sup>8</sup> Ante, § 38; *Bish., Wr. L.*, § 64.

<sup>9</sup> *Gibbons v. Brittenum*, 56 Miss. 232.

<sup>10</sup> *Exp. Ray*, 45 Ala. 15; *O'Neal v. Robinson*, Id. 526; *State v. Heidorn*, 74 Mo. 410.



saving clauses and provisos. The effect of an exception, which "is part of the enacting clause, and is of general application,"<sup>11</sup> is simply to restrict, from application to the matters excepted, the general language of the section or statute, which, without the exception, would have included the same.<sup>12</sup> It is clear that its effect must reach, and control the construction of, the general language of the enactment, preceding or following, so far as its applicability extends.]

A difference, indeed, has been said to exist in this respect between the effect of a saving clause or exception and a proviso in a statute. It is said by Lord Coke that when the enactment and the saving clause are repugnant—as where a statute vests a manor in the king saving the rights of all persons, or vests in him the manor of A. saving the rights of A.—the saving clause is to be rejected, because otherwise the enactment would have been made in vain (*a*). One authority which he cites for this proposition is the case of the reversal of the Duke of Norfolk's attainder, by an Act of Mary. That Act declared that the earlier Statute of 38 Henry VIII., which had attainted the Duke, was no Act, but utterly void, providing, however, that this reversal should not take from the grantees of Henry VIII. or Edward VI. any lands of the Duke which those kings had granted to them; and this provision was held inoperative to save the rights of the grantees. But this resulted, it is said, not because the saving clause was repugnant to the enacting part, but because the latter, in declaring the attainder void, in effect

<sup>11</sup> Wilb., p. 304.

<sup>12</sup> See *Ibid.*; Bish., Wr. L., § 58; Sedgw., p. 50; Potter's Dwarrris, p. 119; Co. Litt. 47a; Shep. Touchst. 78. It follows, that, in an action based on the statute, the pleadings must negative an exception contained in the enacting clause, as otherwise it cannot be seen that the general language of the statute embraces the particular case: see authorities just referred to and cases cited by them. It is obvious that a proviso or saving clause may be engrafted upon the enacting clause as an exception by words of reference. Verba relata

hoc maxime operantur per referentiam, ut in eis inesse videntur. Thus a reservation in a general clause of an act of Parliament, in the words "except as hereinafter mentioned," was held to contain the exception made in a subsequent clause, as if incorporated in the general one; so that plaintiff's declaration must state the reservation and exception: *Vavasour v. Ormrod*, 6 B. & C. 430; 13 Engl. C. L. R. 227, *per* Lord Tenterden. (*a*) *Alton Wood's Case*, 1 Rep. 47. See *Yarmouth v. Simmons*, 10 Ch. D. 518. [See also, Bish. Wr. L., § 65.]

established also that the lands of the Duke had never vested in the Crown; that none, consequently, had ever passed to the grantees; and that there was thus no interest to be saved on which the clause could operate (*a*). [So a saving clause keeping in effect all acts regulating fees, etc., of officers was held not to apply to one taking away fees entirely.<sup>17</sup>]

The illustrations given by Coke are cases of conveyance of land; and the rule as regards the construction of repugnant passages in a conveyance by deed has always been that the earlier of them prevails (*b*). But it may be questioned whether there is any solid ground for this distinction between a saving clause and a proviso in a statute. ["There does not appear<sup>18</sup> to be any real distinction between a saving clause and a proviso. Each of them is . . . 'something engrafted on a preceding enactment.'<sup>19</sup> Each is 'merely an exception of a special thing out of the general things mentioned' in the statute." Each is a limitation or exception to a grant made or authority conferred, the effect of which is to declare that the one shall not operate or the other be exercised unless in the case provided." The office of each is to except some particular case from a general principle where from peculiar circumstances attending the case there would be some hardship if it were not excepted;<sup>20</sup> to qualify, restrain, or otherwise modify the general language of an enacting clause, or to exclude some possible ground of misinterpretation that might exist if cases which the Legislature did not mean to include, were brought within the statute."<sup>21</sup> And as to a proviso, it has been said that its function is that of limiting the language of the law-maker, not of enlarging or

(*a*) Plowd. 565; see *Savings Institution v. Makin*, 23 Maine, 370.

<sup>13</sup> *Webb v. Baird*, 6 Ind. 13.

(*b*) Co. Litt. 112; *Shep. Touchst.* 81, Hard. 94; *Furnivall v. Coombes*, 5 M. & Gr. 736.

<sup>14</sup> Quoted from Wilb., at p. 301.

<sup>15</sup> *Cit. R. v. Taunton*, St. James, 9 B. & C. at p. 836, *per* Bayley, J.

<sup>16</sup> *Cit. Halliswell v. Corp. of Bridgewater*, 2 Anderson, at p. 192.

<sup>17</sup> *Cit. Voorhees v. Bank of U. S.*, 10 Pet. 449, at p. 471.

<sup>18</sup> *Cit. Huidekoper's Lessee v. Burrus*, 1 Wash. at p. 119.

<sup>19</sup> *Cit. Wayman v. Southard*, 10 Wheat. at p. 30; *Minis v. U. S.*, 15 Pet. at p. 445. And see *Sav. B'k v. U. S.*, 19 Wall. 227; *Boon v. Juliet*, 2 Ill. 258; *Ihmsen v. Nav. Co.*, 32 Pa. St. 153, 157; *Sedgw.*, at p. 49. But see *Bish., Wr. L.*, §§ 59, 65.

extending the act or section of which it is a part," and its effect that of negating an authority granted beyond its prescribed and clearly defined limits."

§ 185. [It would seem logically to follow from this view, that, where the proviso or saving clause exceeds that function,—viz., that of creating an exception of some special thing from general language, or excluding some possible ground of misapprehension, it must fail to be of any validity. Accordingly, it has been held that a proviso, as well as a saving clause, which is repugnant to the enacting clause or purview<sup>20</sup> is to be held void.<sup>21</sup> On the other hand it is maintained, that] when the proviso appended to the enacting part is repugnant to it, it unquestionably repeals the enacting part (*a*). The later of two passages in a statute, being the expression of the later intention, should prevail over the earlier; as it unquestionably would, if it were embodied in a separate Act.<sup>22</sup> [But it has been forcibly pointed out, by an eminent writer upon this subject," that since the several parts of a statute are enacted simultaneously, and so appear by the legislative records, there is, in reason, no room for the presumption upon which this rule professes to be based; and that the rule now ought to be that the location of a clause ought not to have the importance attached to it which it formerly had; so that an irreconcilable conflict between two clauses "may vitiate the whole, or the part to which the clauses relate, or the one or the other may give way according to the nature of the

<sup>20</sup> *Re Webb*, 24 How. Pr. (N. Y.) 247.

<sup>21</sup> *Comm'rs of Kensington v. Keith*, 2 Pa. St. 218.

<sup>22</sup> What comes within the "purview of a statute, means the enacting part, or body, of the same, as distinguished from the preamble, saving clause and proviso." *The San Pedro*, 2 Wheat. 132; *Sedgw.* p. 45.

<sup>23</sup> See *Mason v. Boom Co.*, 3 Wall. Jr. 252; *Dugan v. Bridge Co.*, 27 Pa. St. 303, 309; *Exp. Mayor's Ct.*, 4 Clark (Pa.) 315; 1 Kent.

*Comm.\* 463*; though that principle is held not to apply to acts constituting private corporations, any ambiguity in such acts being resolved against the corporation, in favor of the public: *Dugan v. Bridge Co.*, *supra*.

(*a*) *Atty.-Genl. v. Chelsea Waterworks*, Fitzg. 19. [*Farmers' B'k v. Hale*, 59 N. Y. 53; *Townsend v. Brown*, 24 N. J. L. 80; *Bish., Wr. L.*, § 65.]

<sup>24</sup> See *Farmers' B'k v. Hale*, *supra*.

<sup>25</sup> See *Bish., Wr. L.*, § 63.

case.”” And “the true principle undoubtedly is, that the sound interpretation and meaning of a statute, on a view of the enacting clause and proviso, taken and construed together, is to prevail. If the principal object of the act can be accomplished, and stand under the restriction of the proviso, the same is not to be held void for repugnancy.”” Nor, of course, if a reasonable operation can be given to the proviso consistent with the principal object of the act as gathered from its purview, can there be any question of a repeal of the latter by the former; and in construing statutes, the terms of a proviso may be limited by the general scope of the enacting clause, to avoid repugnancy.”” Thus, a proviso may have the effect of suspending, for a time, the operation of a statute and preserving in force another which would be repealed by it immediately; as, where an act, declared to be in effect from the date of its passage, changed the time for holding a certain court in a certain district, but contained a proviso that the first term should be held in a particular county, which, under certain other provisions of the act, could not be done until six months after the passage of the act, it was held that the previously existing law was thereby preserved in force until such term could be held in the county designated.”

§ 186. **Construction of Provisos, etc.**—[From a consideration of the office and function of a proviso, it would seem to follow that it can have no existence, separate and apart from the provision which it is designed to limit. “If it was not intended to restrain the general clause, it was a nullity.”” Upon the repeal of the act, it falls, and does not continue in force as an independent enactment.”” Where it follows and restricts an enacting clause general in its scope and language,

<sup>26</sup> Ibid.

<sup>27</sup> Folmer's App., 87 Pa. St. 133, 137; 1 Kent, Comm. \*463, note *b*. And see Renner v. Bennett, 21 Ohio St. 431.

<sup>28</sup> Treas'r of Vermont v. Clark, 19 Vt. 129. And see Sav. Institution v. Makin, 23 Me. 360.

<sup>29</sup> Graves v. State, 6 Tex. App. 228. And see Clarke v. Rochester, 24 Barb. (N. Y.) 446, for similar

construction of an act amending the charter of a city, but providing that certain sections should not take effect until approved by the corporation.

<sup>30</sup> Ihmsen v. Nav. Co., 32 Pa. St. 153, 157. But see Bish., Wr. L., § 65.

<sup>31</sup> Church v. Stadler, 16 Ind. 463.

it is to be strictly construed and limited to the objects fairly within its terms.<sup>33</sup> Consequently, an exception, from the general provisions of an act exempting property from execution, of cases of claims for wages of "laborers or servants," would not include those of persons occupying the position of book-keeper, or the like.<sup>34</sup> Nor would an exception from the benefits of the statute of limitations of notes, bills, or other evidences of debt issued by any bank or other moneyed corporation, cover notes of a railroad company authorized by law to be circulated as money.<sup>35</sup> Moreover, a proviso is always to be construed with reference to the immediately preceding parts of the clause to which it is attached<sup>36</sup> and limits only the passage to which it is appended, and not the whole section or act,<sup>37</sup> or, at least, only the section with which it is incorporated.<sup>38</sup> Thus, where a section of an act ended with a proviso that no debtor should be imprisoned on any process for more than twelve months for any debt incurred before the filing of his petition, in case a final order for protection from process was refused, it was held that this did not refer to all cases where the final order was refused, but only to such as were suggested in the preceding part of the section;<sup>39</sup> and where the third section of an act gave a court stenographer a compensation of \$10 per day spent in court taking notes, with a proviso, that the whole compensation, in counties of a certain number of inhabitants, should not exceed \$1200 per annum, and the fourth section required him to write out the notes in long hand, when ordered by the court to do so, at a certain

<sup>33</sup> U. S. v. Dickson, 15 Pet. 141, 165; Epps v. Epps, 17 Ill. 196; Roberts v. Yarboro, 41 Tex. 449. But it is said, that, in a criminal statute, an exception or proviso will be liberally construed in favor of the defendant: see Bish., Wr. L., §§ 226, 227, 229; and he need only bring himself within its letter, to be entitled to its benefit, regardless of its intent: *ib.* § 229. And so, provisos and saving clauses protecting acts done under a statute repealed, are to be liberally construed: Foster v. Pritchard, 2 H. & N. 151; 40 E. L. & Eq. R. 446.

And a clause saving rights existing at the "passage" of an act will protect rights existing at the time of its going into effect: Rogers v. Vass, 6 Iowa, 405.

<sup>34</sup> Epps v. Epps, *supra*. Comp. ante, § 99.

<sup>35</sup> Butts v. R. R. Co., 63 Miss. 462.

<sup>36</sup> Wilb., p. 302, *cit.* Exp. Partington, 6 Q. B. 649, at p. 653.

<sup>37</sup> *Ibid.*; Spring v. Collector, 78 Ill. 101.

<sup>38</sup> Lehigh Co. v. Meyer, 102 Pa. St. 479.

<sup>39</sup> Exp. Partington, *supra*.

rate of compensation, it was held that the effect of the proviso was limited to the compensation and services required by the third section, and that, if the compensation for services of the kind designated in the fourth section, together with the per diem allowance made by the third, exceeded \$1200, the county was liable therefor.<sup>39</sup> But it is said<sup>40</sup> that the mere fact "that a proviso was printed as part of any one section did not, at the time when statutes were not divided into sections upon the roll, limit the effect or construction of the proviso."<sup>41</sup> 'The question whether a proviso in the whole or in part relates to and qualifies, restrains or operates upon the immediately preceding provisions only of the statute, or whether it must be taken to extend in the whole or in part to all the preceding matters contained in the statute, must depend, I think, upon its words and import, and not upon the division into sections that may be made for convenience of reference in the printed copies of the statute.'<sup>42</sup> Remembering the slight importance that is to be attached to the mere arbitrary divisions of statutes by the Legislature itself,<sup>43</sup> this rule, it seems, must still, with proper limits and caution as to the application of it, be deemed a reasonable one. Thus, where the first section of an act gave to registers, etc., of the land office the right to charge certain fees for certain services; the next gave the right to registers, in or out of office, to be compensated by the United States for similar past services at the same rate; and at the end of this section came a proviso that no register or receiver should receive for his services during every year a greater compensation than the maximum then allowed by law, it was held that the proviso applied to the whole act and limited the compensation for future services as well as past.<sup>44</sup> Conversely, a proviso in the first section of an act, that it should not apply to estates in process of settlement, was held to apply equally to the second section of the act, repealing the existing law.<sup>45</sup>

<sup>39</sup> *Lehigh Co. v. Meyer*, supra.

<sup>40</sup> *Willb.*, pp. 302-303.

<sup>41</sup> *Cit. R. v. Threlkeld*, 4 B. & Ad., at pp. 235, 236; *Wells v. Ig-gulden*, 3 B. & C. at p. 189.

<sup>42</sup> *R. v. Newark*, 3 B. & C., at p. 71, *per* Holroyd, J.

<sup>43</sup> See ante, §§ 61, 69-70.

<sup>44</sup> *U. S. v. Babbit*, 1 Black 55.

<sup>45</sup> *Mechanics', etc., B'k's App.*, 31 Conn. 63. See *Foster v. Pritchard*, supra; *Rogers v. Vass*, supra.

§ 187. **Repugnant Acts passed at Different Sessions.**—[The same rule, which, between two irreconcilable passages or provisions in the same statute, gives validity to the later one, requires, that, where two statutes are irreconcilable and mutually repugnant, the one later in date or order should be held to repeal the earlier one.<sup>46</sup>

§ 188. **Repugnant Acts passed at Same Session.**—[Not only statutes passed at different sessions of the Legislature may thus affect each other, but a repeal by implication has been effected where two inconsistent enactments have been passed at the same session;<sup>47</sup> even while the earlier act was in its progress to become a law, but before it had become so by the executive approval;<sup>48</sup> it being said that the parliamentary rule, that an act shall not be repealed at the session at which it was passed, has no reference to repeal by implication.<sup>49</sup> But, as has been seen, statutes enacted at the same session

<sup>46</sup> See *U. S. v. Irwin*, 5 McLean 178; *Morlot v. Lawrence*, 1 Blatchf., 608; *Powers v. Barney*, 5 Id. 202; *Union Iron Co. v. Pierce*, 4 Biss. 327; *U. S. v. Barr*, 4 Sawyer, 254; *West v. Pine*, 4 Wash. 691; *Ogden v. Witherspoon*, 2 Hayw. 227; *Kingsland v. Palmer*, 52 N. Y. 83; *Lyddy v. Long Island City*, 104 Id. 218; *Bowen v. Lease*, 5 Hill (N. Y.) 221; *Rochester v. Barnes*, 26 Barb. (N. Y.) 657; *People v. New York*, 32 Id. 102; *Excelsior, etc., Co. v. Embury*, 67 Id. 261; *Pease v. Whitney*, 5 Mass. 380; *New London, etc., R. R. Co. v. R. R. Co.*, 102 Id. 386; *West Chicago Park Comm'rs. v. Brenock*, 18 Ill. App. 559; *Korah v. Ottawa*, 32 Ill. 121; *Sullivan v. Peopie*, 15 Id. 233; *Moore v. Moss*, 14 Id. 106; *State v. Smith*, 7 Iowa 244; *Casey v. Harned*, 5 Id. 1; *Edgar v. Greer*, 8 Id. 394; *Kinney v. Mallory*, 3 Ala. 626; *George v. Skeates*, 19 Id. 738; *Commercial B'k v. Chambers*, 16 Miss. 9; *State v. Blake*, 32 N. J. L. 208; *Jersey City v. R. R. Co.*, 20 N. J. Eq. 360; *Southwark B'k v. Com'th*, 26 Pa. St. 446; *Johuston's Est.*, 33 Pa. St. 511; *Com'th v. R. R. Co.*, 53 Id. 62; *People v. Grip-pen*, 20 Cal. 677; *Exp. Smith*, 40 Id. 419; *Parrott v. Stevens*, 37

Conn. 93; *Tierney v. Dodge*, 9 Minn. 166; *Cumberland v. Magruder*, 34 Md. 381; *Moore v. Vance*, 1 Ohio 10; *State v. Miskimons*, 2 Ind. 440; *State v. Youmans*, 5 Id. 280; *Peru, etc., R. R. Co. v. Bradshaw*, 6 Id. 146; *Comm'rs v. Potts*, 10 Id. 286; *Dowell v. State*, 58 Id. 333; *Swinney v. R. R. Co.*, 59 Id. 205; *Ham v. State*, 7 Blackf. (Ind.) 314; *McQuilkin v. Doe*, 8 Id. 581; *Adams v. Ashby*, 2 Bibb (Ky.) 96; *Maddox v. Graham*, 2 Metc. (Ky.) 56; *Naz. Lit., etc., Inst. v. Com'th*, 14 B. Mon. (Ky.) 266; *Eckloff v. District of Columbia*, 4 Mackey (D. C.) 572; *Morrison v. Barksdale*, Harp. (S. C.) 101; *Byrne v. Stewart*, 3 Desau. (S. C.) 135; *State v. Stoll*, 2 Rich. N. S. (S. C.) 538; *Grant Co. v. Sels*, 5 Oreg. 243; *Hurst v. Hawn*, Id. 275; *Thorpe v. Schooling*, 7 Nev. 15; *Greeley v. Jacksonville*, 17 Fla. 174; *Branagan v. Dulaney*, 8 Col. 408.

<sup>47</sup> *R. v. Middlesex Justices*, 2 B. & Ad. 818; *Johnson v. Byrd*, Hempst. 434; *Bourignon, etc., Ass'n v. Com'th*, 98 Pa. St. 54; *Atty.-Gen. v. Brown*, 1 Wis. 513; *People v. Lytle*, 1 Idaho, 161.

<sup>48</sup> *Southw. B'k. v. Com'th*, 26 Pa. St. 446.

<sup>49</sup> *Spencer v. State*, 5 Ind. 41.

are to be construed, to a certain extent, as one entire act, and therefore it is said, that, in order to make a later enactment repeal a former one, passed at the same session, there must be an express declaration, or an absolute inconsistency;<sup>50</sup> that is, there is in such a case probably a stronger presumption against an intention to repeal, which is unexpressed, than in the case of statutes passed at different sessions. For, whilst the rule as to the latter is, in general, that, if possible, the construction must be such as to permit both acts to stand, yet "it can hardly be said that there are any absolute rules for determining the question of implied repeal. The question, in every case, is whether the intention of the later act, as ascertained by judicial construction upon all the grounds applicable to it, is to lay down a rule which puts aside the rule provided by the earlier act; and it is not reasonable, nor do we conceive it to be the law, that the intent of the later act is always to be narrowed down so as, if possible, to preserve the operation of the earlier act. . . We think we are bound to consider the special nature and object of [the particular] kind of legislation [to which the statutes in question belong,] and whether [they] present a case which stands in the same plane with the statutes to which the doctrine of enforced co-operation has ordinarily been applied."<sup>51</sup>

§ 189. **Acts passed Same Day.**—[Two inconsistent acts passed at precisely the same time must necessarily nullify each other.<sup>52</sup> To escape this result as to statutes passed or approved on the same day, it is the rule that the one later approved may repeal the earlier to the extent of the repugnancy between them;<sup>53</sup> and especially is such the effect of an act passed the same day with another inconsistent one, but later in number as a chapter of the laws, and being local or particular in its application,<sup>54</sup> and intended to take effect

<sup>50</sup> *Peyton v. Mosely*, 3 T. B. Mon. (Ky.) 77. See, as to construction as one act, § 46.

<sup>51</sup> *Eckloff v. District of Columbia*, 4 Mackey (D. C.) 572, *per* James, J.

<sup>52</sup> *State v. Heidorn*, 74 Mo. 410.

<sup>53</sup> *Strauss v. Heiss*, 48 Md. 292.

Fractions of a day may be noticed to prevent great mischief or inconvenience: *Hampton v. Erenzeller*, 2 Browne (Pa.) 19. Post, §§ 389, seq., 498.

<sup>54</sup> *Mead v. Bagnall*, 15 Wis. 156; and see case in next note. But see § 189.



at a later date than the previous more general one.<sup>55</sup> But, of course, the same rule that requires the harmonization of two acts passed the same session, if possible, applies with at least equal force to acts passed on the same day.<sup>56</sup> Thus, where an act provided that deeds should be registered in the probate registry for the county or city where the property was situated, and another, passed the same day, that deeds might be registered in the county registry, it was held that the two acts should be construed together, with the effect of allowing deeds relating to lands in a city to be registered in a county registry.<sup>57</sup> And so where two acts upon the same subject were passed on the same day, the one to go into effect immediately, the other, apparently dispensing with most of the matters provided for in the first, to go into effect at a future day, it was held that full effect could be given to both acts without imputing inconsistency to the Legislature.<sup>58</sup>

§ 190. [As to the question which of two acts is to be regarded as the later, it is said that the date of approval, not that of publication, is controlling in the determination of the Legislative intent, so far as the same depends upon priority of action ;<sup>59</sup> so that the mere fact that a statute, in the authorized publication of laws, precedes another of a later, or perhaps of the same date, was held ineffectual to enable the latter to modify or supersede the former.<sup>60</sup> But, as between the date of passage and that of approval, it was held in Pennsylvania, that the fact that the governor's signature was appended to an act which was repealed, in part, by another passed and signed while the first was before him, would not, of course, revive the repealed clause, the repeal being, though only implied and not express, unmistakably intended.<sup>61</sup> "He had no more power to reinstate the abolished section, than he had to make a new law without the sanction of the Legislature."<sup>62</sup> On the other hand, in

<sup>55</sup> *Metrop. B'd of Health v. Schmades*, 3 Daly (N. Y.) 282. See, however, upon this subject, so far as it depends upon the commencement of statutes, post, §§ 190, 500.

<sup>56</sup> See ante, § 45.

<sup>57</sup> *Beale v. Hale*, 4 How. 37.

<sup>58</sup> *Fouke v. Fleming*, 13 Md. 392.

<sup>59</sup> *Mead v. Bagnall*, 15 Wis. 156.

<sup>60</sup> *Thomas v. Collins*, 58 Mich. 64.

<sup>61</sup> *Southwark B'k v. Com'th*, 26 Pa. St. 446 ; such intention being shown from the legislative journals.

<sup>62</sup> *Ibid.*, at p. 451, *per* Lewis, C. J.

Kansas, where a code provided that it should go into effect on June 1, and a subsequent act, expressly amendatory of the code, declared that the same should go into effect from and after the date of the passage of the amendatory act, the latter being approved on February 10, and the code on February 11, it was held that the act last approved must control, *i. e.*, that the code went into effect on June 1.<sup>63</sup>

§ 191. **Constitutional Requisites as to Repeal Inapplicable to Implied Repeal.**—[It may be here observed that the doctrine of implied repeal is not destroyed by constitutional provisions directing certain observances by the Legislature in repealing enactments, *e. g.*, that repealing acts shall recite the title or substance of the act intended to be repealed;<sup>64</sup> or restricting acts to a single subject to be expressed in the title.<sup>65</sup> Of course, where an act is passed inconsistent with a former statute, but containing no express repeal of the same, in accordance with constitutional requirements of form, and a few days later another is adopted removing the conflict between the two, the act which would otherwise have operated as a repealing act is unobjectionable on the score of constitutional defect and must be held valid.<sup>66</sup>

§ 192. **Repeal by Unconstitutional Acts.**—[On the other hand, it would seem that no repeal by implication can result from a provision in a subsequent statute when that provision is

<sup>63</sup> *Elliott v. Lochrane*, 1 Kan. 126.

<sup>64</sup> *Home Ins. Co. v. Taxing Distr.*, 4 Lea (Tenn.) 644; *Ballentine v. Pulaski*, 15 Id. 633; *Poe v. State*, 85 Tenn. 495; and see to same effect: *Geisen v. Heiderich*, 104 Ill. 537; *Swartwout v. Air Line Co.*, 24 Id. 389; *Lehman v. McBride*, 15 Ohio St. 573; *Spencer v. State*, 5 Ind. 41; *Branham v. Lange*, 16 Id. 497; *Anderson v. Com'rs*, 18 Gratt. (Va.) 295; and see also *Falconer v. Robinson*, 46 Ala. 340. Compare, however, *Greeley v. Jacksonville*, 17 Fla. 174. The same is true of statutes acting, impliedly, as amendments of others: *People v. Mahaney*, 13 Mich. 481. The doctrine stated in

the text is tacitly acted upon in an uncountable number of decisions, recognizing implied repeals under similar constitutional provisions. But it may be too broad to say that such provisions have no effect whatever upon the doctrine of implied repeal, or its application. It may very reasonably be supposed that the exercise of the power of express repeal being subjected to such restrictions in the interest of certainty, an intention to exercise the power of implied repeal should not be presumed, except in the clearest cases.

<sup>65</sup> *Geisen v. Heiderich*, *supra*.

<sup>66</sup> *Morrell v. Fickle*, 3 Lea (Tenn.) 79.

itself devoid of constitutional force. Thus, where the constitution requires the subject of an enactment to be indicated in its title, it was held that an act was not to be deemed repealed by a later repugnant one, whose subject-matter, however, on the point of such inconsistency, was germane to nothing in its title.<sup>67</sup>

§ 193. **When Later Act does not Repeal Earlier Repugnant Act.**—[The rule that a later act repeals, by implication, that which is inconsistent with it in an earlier one is, however, but the expression of an intention presumed to be entertained by the Legislature in making the law. As such, it is of course negatived and rendered inoperative by the expression of a contrary intention in the later statute.<sup>68</sup> And if, in passing an act, the Legislature declares that another earlier act is "to have the same effect as if passed after this Act,"—a provision, which, though somewhat anomalous, does not transcend the legislative power,<sup>69</sup>—the position of the two acts, for the purposes of construction, as to the relative effect of one upon repugnant provisions in the other, is reversed; *i. e.*, whenever the two are in conflict, the later is subordinate to the earlier.<sup>70</sup>]

§ 194. **Re-enactments.**—It has been held that where a statute merely re-enacts the provision of an earlier one, it is to be read as part of the earlier statute, and not of the re-

<sup>67</sup> *Miller v. Edwards*, 8 Col. 528. Similarly, it has been said that a repeal of all laws inconsistent with a statute does not affect laws inconsistent with such parts thereof as are themselves unconstitutional and void: *Devoy v. New York*, 35 Barb. (N. Y.) 264; *Harbeck v. New York*, 10 Bosw. (N. Y.) 366; *Sullivan v. Adams*, 3 Gray (Mass.) 476. It has, indeed, been held that a repealing clause in a statute may be valid, though every other portion of it be unconstitutional: *Ely v. Thompson*, 3 A. R. Marsh. (Ky.) 70; and see *Harvey v. Virginia*, 20 Fed. Rep. 411. But, *ex contrario*, it is asserted, that, where an act, in its substantial provisions, is unconstitutional, a clause declaring all acts incon-

sistent therewith repealed must, of necessity, leave those acts unaffected: *Tims v. State*, 26 Ala. 165; *State v. Lacrosse*, 11 Wis. 51; *Shepardson v. R. R. Co.*, 6 Id. 605; unless it is apparent that the Legislature intended to repeal the old law at all events: *Childs v. Shower*, 18 Iowa, 261. Similarly it has been held, that, where one section of an unconstitutional act repealed all existing statutes on the subject, they were left unimpaired thereby: *People v. Tip-haine*, 3 Park. Cr. (N. Y.) 241. *Comp. Bish., Wr. L.*, §§ 34, 152.

<sup>68</sup> See *People v. Kelly*, 7 Robt. (N. Y.) 592.

<sup>69</sup> *People v. Jaehne*, 103 N. Y. 182. And see ante, § 183.

<sup>70</sup> *Ibid.* See further, post, § 222.

enacting one, if it is in conflict with another passed after the first, but before the last Act; and therefore does not repeal by implication the intermediate one (a). [And the re-enactment, at the same session of the Legislature, of certain sections of one act in a subsequent one, providing, except in the re-enacted sections, a different scheme from the first, was held not to work a repeal, by implication, of those sections in the first act; and a provision in the second act suspending the operation of those sections in it, did not suspend the operation of the same sections in the first act, according to which they were to take effect at once."<sup>71</sup>

§ 195. **Amendments.**—[An amendment of a statute may or may not operate as an implied repeal of the original law. If it does not change the same, but merely adds something to it, it is not, in general, a repeal thereof."<sup>72</sup> Where, on the other hand, the amendment changes the old law in its substantial provisions, it must, by necessary implication, repeal it to the extent to which the new is in conflict with, and repugnant to, the old ;"<sup>73</sup> but not beyond. Thus, where, under a statute fixing the limit of grand larceny at \$5 or upwards, an offence was committed consisting in the larceny of \$23, and before trial and conviction, an amendatory act was passed changing the limit from \$5 to \$15 as the minimum to constitute grand larceny, it was held that there was no repeal of the earlier act except as to the limit,—a change which did not affect the case in question, since there never was a time when the larceny of an amount exceeding \$15 did not constitute grand larceny under the law."<sup>74</sup> If, however, the amendatory statute covers the entire subject matter of the old law, and is inconsistent with its provisions, it must be held to repeal the same by implication."<sup>75</sup> And even if it is not repugnant in express terms, yet, if it covers

(a) *Morisse v. Royal British Bank*, 1 C. B. N. S. 67, 26 L. J. 62; *per Willes, J.*, citing *Wallace v. Blackwell*, 3 Drew. 538; and see *R. v. Dove*, 3 B. & A. 596.

<sup>71</sup> *Powers v. Shepard*, 48 N. Y. 540. See post, § 490.

<sup>72</sup> *Longlois v. Longlois*, 48 Ind. 60.

<sup>73</sup> *Ibid.*; *Breitung v. Lindauer*,

37 Mich. 217. And see *McRobert v. Washburne*, 10 Minn. 23, *infra*.

<sup>74</sup> *State v. Miller*, 58 Ind. 399, and accordingly the order of the lower court quashing the indictment, on the ground of a repeal of the older act, was held to be error.

<sup>75</sup> *Pana v. Bowler*, 107 U. S. 529; *Longlois v. Longlois*, 48 Ind. 60.

the whole subject of the amended act, and contains new provisions showing it to be intended as a substitute for the same, it will operate as a repeal of it.<sup>76</sup> But an amendatory statute should not receive a forced construction so as to make it a repealing statute.<sup>77</sup> And an unconstitutional amendment cannot have the effect of repealing, by mere implication, the original act.<sup>78</sup>

§ 196. Amendments "so as to read," etc.—[Where an act or portion of an act is amended "so as to read" in a prescribed way, it has been said that the section amended is entirely repealed and obliterated thereby.<sup>79</sup> It is perfectly clear, that, as to all matters contained in the original enactment, and not incorporated in the amendment, the latter must be held to have the effect of a repeal.<sup>80</sup> But as to the remainder, *i. e.*, that, which, in the amendatory act, is declared thereafter to be its form and effect, it would seem that even an amendment in the phrase indicated, does not have the effect of a simultaneous repeal and re-enactment,<sup>81</sup> but that of a merger of the original statute, in the new, leaving the old statute no vitality distinct from the new, and of force only as to past transactions,<sup>82</sup> as to which it must be deemed to be continued in force as from the time of its first enactment,<sup>83</sup> whilst, as to new transactions, its whole force rests upon the amendatory statute.<sup>84</sup> So complete, however, is the merger of an act in such an amendment, that the repeal of the amending act is said not to be capable of reviving the original law, but to annihilate the same, as effectually as if it

<sup>76</sup> *Breitung v. Lindauer*, 37 Mich. 217; and see *Longlois v. Longlois*, supra.

<sup>77</sup> *Lucas Co. v. Ry. Co.*, 67 Iowa 541.

<sup>78</sup> *Exp. Davis*, 21 Fed. Rep. 396. See also *State v. Alexander*, 9 Ind. 337. But comp. *Billings v. Harvey*, 6 Cal. 381.

<sup>79</sup> *State v. Andrews*, 20 Tex. 230; and see *Wilkinson v. Ketler*, 59 Ala. 306; *Blakemore v. Dolan*, 50 Ind. 194.

<sup>80</sup> *Moore v. Mausert*, 49 N. Y. 332; *People v. Supervisors*, 67 Id. 109; *State v. Ingersoll*, 17 Wis. 631; *Goodno v. Oshkosh*, 31 Wis.

127; *Mosby v. Ins. Co.*, 31 Gratt. (Va.) 639; and see *Bish., Wr. L.*, § 15 2a. See *Addenda*.

<sup>81</sup> *Burwell v. Tullis*, 12 Minn. 572.

<sup>82</sup> *People v. Supervisors*, 67 N. Y. 109.

<sup>83</sup> *Moore v. Mausert*, 49 N. Y. 332; *Ely v. Holton*, 15 N. Y. 595.

<sup>84</sup> *People v. Supervisors*, supra; *Ely v. Holton*, supra. So that, of course, the amendment could have no retroactive efficacy: *Ibid.*; *McGeehan v. Burke*, 37 La. An. 156; *Bish., Wr. L.*, § 152a. But see *Burwell v. Tullis*, 12 Minn. 572. And see post, § 294.

also were expressly repealed;<sup>86</sup> so complete, that the word "hereafter" used in such an amendment refers to the date of the passage of the original act;<sup>87</sup> and that an act repealing "~~section 6~~" of a certain act, which had been amended so that a new section stood in the place of the original section 6, repealed section 6 as amended." A provision enacted "in lieu" of another was held to repeal the same.<sup>88</sup>

§ 197. **Repugnancy in Schedule.**—Where a passage in a schedule appended to a statute was repugnant to one in the body of the statute, the latter was held to prevail (*a*).

§ 198. **Implied Repeal by Negative Statutes.**—When the later of the two general enactments is couched in negative terms, it is difficult to avoid the inference that the earlier one is impliedly repealed by it. For instance, if a general Act exempts from licensing regulations the sale of a certain kind of beer, and a subsequent one enacts that "no beer" shall be sold without a license, it would obviously be impossible to save the former from the repeal implied in the latter (*b*). [And where a statute provides, that, thereafter, "no corporation" should interpose the defence of usury, it is clear that the effect of such an enactment is a repeal of the usury laws as to corporations.<sup>89</sup>]

§ 199. **Implied Negative in Affirmative Statutes.**—But even when the later statute is in the affirmative, it is often found to involve that negative which makes it fatal to the earlier

<sup>86</sup> *People v. Supervisors*, supra; *Goodno v. Oshkosh*, 31 Wis. 127; and see post, §§ 475-477.

<sup>87</sup> *Moore v. Mausert*, supra. See to same effect as to "hereinbefore provided": *McKibben v. Lester*, 9 Ohio St. 627. But see *People v. Wayne Circ. Judge*, 37 Mich. 287, that "heretofore" in an amendment adopted 22 years after the passage of the original act, providing that actions on judgments *heretofore* rendered should be barred in 10 years after entry thereof, means before the passage of the amendment, it being absurd to confine the provision to judgments rendered before the passage of the original act.

<sup>87</sup> *Greer v. State*, 22 Tex. 588. *S. P. State v. Ranson*, 73 Mo. 88; *Kamerick v. Castleman*, 21 Mo. App. 587.

<sup>88</sup> *Gossler v. Goodrich*, 3 Clif. 71; *Steamb. Co. v. Collector*, 18 Wall. 478.

(*a*) *R. v. Baines*, 12 A. & E. 227; *Allen v. Flicker*, 10 A. & E. 640, *per* Patteson, J.; *R. v. Russell*, 13 Q. B. 237; *Dean v. Green*, L. R. 8 P. D. 89, *per* Lord Penzance. See *Clarke v. Grant*, 8 Ex. 252, 22 C. J. 67. [See ante, § 71.]

(*b*) *Read v. Story*, 30 L. J. M. C. 110, 6 H. & N. 423; remedied by 24 & 25 Vict. c. 21, s. 3.

<sup>89</sup> *Balleston Spa B'k v. Marine B'k*, 16 Wis. 120.

enactment (a). [Thus, if a subsequent statute requires the same and more than a former one prescribed, this is necessarily a repeal of the earlier act, so far as the later act renders more necessary than the earlier one prescribed.<sup>90</sup> And vice versa,] if an Act requires that a juror shall have twenty pounds a year, and a new one enacts that he shall have twenty marks, the latter necessarily implies, on pain of being itself inoperative, that the earlier qualification shall not be necessary, and thus repeals the first Act (b). [A grant of authority by the Legislature to county commissioners to create a debt and provide for the payment of interest thereon, was held to be an enlargement of their power to assess taxes to meet the demand, and as implying a repeal of any conflicting statutory limitation.<sup>91</sup>] Where an act of Charles II. enabled two justices of the peace, "whereof one to be of the quorum," to remove any person likely to be chargeable to the parish in which he comes to inhabit; and another, after reciting this provision, repealed it, and enacted that no person should be removable until he became chargeable, in which case "two justices of the peace" were empowered to remove him; it was held that the later Act dispensed with the qualification of being of the quorum (c). The provision of the 43 Eliz., which gave an appeal without any limits as to time against overseers' accounts, was impliedly repealed by a subsequent Act, which gave power to appeal to the next Quarter Sessions (d). [So, a statute giving a right of appeal generally is repealed by one giving a right of appeal in cases involving more than \$5.<sup>92</sup>] The Nuisances Removal Act of 1848, in providing that the costs of obtaining and executing an order of justice under the Act against an owner of premises should be recoverable in the County Court, impliedly repealed, as regards such cases, the enactment of the County Court Act, that those Courts should not take

(a) Bac. Ab. Stat. D.; Foster's Case, 5 Rep. 59. See Lord Blackburn's judgment in *Garnett v. Bradley*, 3 App. 966.

<sup>90</sup> *Gorham v. Lockett*, 6 B. Mon. (Ky.) 146.

(b) *Jenk., Cent. 2, 73, 1 Bl. Comm. 89.*

<sup>91</sup> *Com'th v. Commissioners*, 40

Pa. St. 348.

(c) 13 & 14 Car. 2, c. 13, and 35 Geo. 3, c. 101; *R. v. Llangian*, 4 B. & S. 249, 32 L. J. M. C. 225, dissentiente Cockburn, C. J.

(d) 43 Eliz. c. 2, s. 6, 17 Geo. 2, c. 38, s. 4; *R. v. Worcestershire*, 5 Man. & S. 457.

<sup>92</sup> *Curtis v. Gill*, 34 Conn. 49.

cognizance of cases where title to real property was in question; for it would have been inoperative if the Court could not decide the question of ownership (*a*). [An act giving a court jurisdiction in general terms, and without restriction as to the amount claimed, over a certain kind of cases, was held to repeal, by implication, an earlier act under which its jurisdiction could be exercised only over a peculiar kind of such cases.<sup>93</sup>] The judicature Act of 1873 repealing in general words all statutes inconsistent with it, and enacting that the costs of all proceedings in the High Court shall be in the discretion of the Court, and that where an action is tried by a jury, the costs shall follow the event unless the Judge, at the trial, or the Court otherwise orders, was held to repeal the Act of James I., which deprived a successful plaintiff of costs in an action of slander when he did not recover as much as forty shillings damages (*b*). Where an Act made it actionable to sell a pirated copy of a work with knowledge that it was pirated, and a subsequent Act contained a similar provision, but without any mention of guilty knowledge, it was held that the earlier Act was so far abrogated that an action was maintainable for a sale made in ignorance of the piracy (*a*). Where an Act required that a consent should be given in writing attested by two witnesses, and a subsequent Act made the consent valid if in writing, but made no mention of witnesses, this silence was held to repeal by implication the provision which required them (*c*). Where an Act exempted from impressment all seamen employed in the Greenland fisheries, and a later one exempted seamen embarked for those fisheries whose names were registered and who gave security, it was held that the earlier was repealed *pro tanto* by the later Act (*d*).

§ 200. Statutes Intended to Furnish Exclusive Rule.—[The “implied negative” referred to in the preceding section is

(*a*) 11 & 12 Vict. c. 123, s. 8, 9 & 10 Vict. c. 95, s. 58; *R. v. Harden*, 2 E. & B. 288, 22 L. J. 299.

<sup>93</sup> *Farley v. DeWatre*, 2 Daly (N. Y.) 192.

(*b*) *Garnett v. Bradley*, 3 App. 944. See also *per Jessel, M. R.*, in *Mersey Docks v. Lucas*, 51 L. J. Q. B. 116; *Gardner v. Whitford*, 4

C. B. N. S. 665.

(*c*) *Cumberland v. Copeland*, 1 H. & C. 194, 13 L. J. Ex. 353; *per Jervis, C. J.*, in *Jeffreys v. Boosey*, 4 H. L. 943; and *per Lord Wensleydale* in *Kyle v. Jeffreys*, 3 Macq. 611, 31 L. J. Ex. 355n. See further, post, § 384.

(*d*) *Exp. Carruthers*, 9 East, 44.



to be found, indeed, wherever the later statute clearly intends to prescribe the only rule which is to be accepted as governing the case provided for ; and where it does so, it repeals the earlier law by implication."<sup>94</sup> Thus, where one of two acts for the assessment and collection of a tax required notice of the election to vote the tax to be posted ten days and published two weeks, and limited the tax to \$1.50 on every \$100 ; and the other required notice to be posted twenty days and published three weeks, and limited the rate of taxation to 70 cents on every \$100, it was held that the latter act must be deemed to repeal the former by implication."<sup>95</sup> If the co-existence of two sets of provisions would be destructive of the object for which the later act was passed, the earlier would be repealed by the later. Thus, when a local act empowered one body to name the streets and to number the houses in a town, and another local act gave the same power to another body, the earlier would be superseded by the later Act ; for, to leave the power with both, would be to defeat the object of the Legislature (a). [So, where a general act relating to the establishment, management, etc., of boroughs, provided a method for the opening of streets therein by the town councils, it was held that thereby the general road law, prescribing a procedure for the laying out, etc., of highways by the courts of Quarter Sessions, was impliedly repealed as to boroughs falling under the first-mentioned act, it being impossible " that two independent and conflicting systems were designed by the legislature to apply to the streets of a single borough." "<sup>96</sup> And where an act, repealing all provisions of laws repugnant to and inconsistent with it, directed that the sheriffs of certain counties should

<sup>94</sup> See *Daviess v. Fairbairn*, 3 How. 636 ; *D. & L. Plank Road v. Allen*, 16 Barb. (N. Y.) 15 ; *State v. Jersey City*, 40 N. J. L. 257 ; *Sch. Distr. v. Whitehead*, 13 N. J. Eq. 290 ; *Riggs v. Brewer*, 64 Ala. 282 ; *Swann v. Buck*, 40 Miss. 268 ; *Sacramento v. Bird*, 15 Cal. 294 ; *State v. Conkling*, 19 Id. 501.

<sup>95</sup> *People v. Burt*, 43 Cal. 561 ; See also *Evansville v. Bayard*, 39 Ind. 450.

(a) *Daw v. Metropolitan Board*,

31 L. J. C. P. 223, 12 C. B. N. S. 161. See *Cortis v. Kent, Waterworks*, 7 B. & C. 314 ; *R. v. Middlesex*, 2 B. & Ad. 818 ; *Bates v. Winstanley*, 4 M. & S. 429. [See *New London, etc., R. R. Co. v. Boston, etc., R. R. Co.*, 102 Mass. 386.]

<sup>96</sup> *Re Alley in Kutztown*, 2 Woodw. (Pa.) 373. And see, to similar effect : *Re Spring Street*, 112 Pa. St. 258.

collect the taxes, it was held to repeal another, passed a few days before, creating the office of tax-collector in one of the counties enumerated.<sup>97</sup>

§ 201. **Revisions and Codifications.**—[But possibly the strongest implication of a negative, very similar to that referred to in the preceding section, is found where subsequent statutes revising the whole matter of former ones, and evidently intended as substitutes for them, introduce a new rule upon the subject. In such cases, the later act, although it contains no words to that effect, must, in the principles of law, as well as in reason and common sense, operate to repeal the former<sup>98</sup>—the negative being implied from the “reasonable inference that the Legislature cannot be supposed to have intended that there should be two distinct enactments embracing the same subject matter in force at the same time.”<sup>99</sup> If this could be the case, it is obvious that the later statute could become the law only so far as parties might choose to follow it;<sup>100</sup> whereas, the mere fact that a statute is made shows, that, so far as it goes, and so far as it introduces a new rule of general application, it was intended as a substitute for, and to displace, an earlier one of equally general application.<sup>101</sup> Thus, where, of two statutes relating to liens of laborers in manufactories and intended to protect the wages of such, the one last passed covered the entire subject matter, differing from the earlier one in substituting a limitation as to amount, instead of as to time; in naming as parties subject to the legislation all persons “owning or leasing forges, furnaces, rolling mills, nail factories, machine shops or foundries,” instead of “owner or owners of any manufacturing establishment;” in making the wages protected a claim to be paid by the officer who sells the property, in the manner he is required to pay rent, instead of merely a “lien on the establishment;” in preferring such claims in all assignments, to rank immediately before rent in case of death, and to be paid “in all cases of execution,” instead of

<sup>97</sup> *People v. Lytle*, 1 Idaho, 161.

<sup>98</sup> *Bartlett v. King*, 12 Mass. 546,  
*per Dewey, J.*

<sup>99</sup> *Com'th v. Kelliher*, 12 Allen

(Mass.) 480, 481; *Herron v. Carson*, 26 W. Va. 62.

<sup>100</sup> *Barker v. Bell*, 46 Ala. 216, 221.

<sup>101</sup> See *Ibid.*

making them payable out of the proceeds of sale only in the event of death or insolvency,—it was held that the later act, upon the principle above stated, must be held impliedly to repeal the earlier.<sup>102</sup> So an act providing a new system in cases of land damages for the laying out of roads, by requiring the county courts to institute and prosecute, in their names, in the circuit court, proceedings to ascertain the compensation to be paid, repeals by necessary implication a former act providing, that, in such cases, the county courts should award a writ of *ad quod damnum* returnable to such courts.<sup>103</sup> So, again, where the subject of the incorporation and management of building associations was covered and regulated by acts imposing, in some respects, different modes of incorporation, different conditions, duties, powers and restrictions, as compared with former acts upon the same subject, it was held that the latter were impliedly repealed.<sup>104</sup> And, indeed, the principle stated seems to have universal recognition.<sup>105</sup>

§ 202. [The rule seems, indeed, to go further, and to work an implied repeal in all cases in which a general revision of the old law is made by the Legislature, with an intent to substitute the new legislation for the old.<sup>106</sup> Upon this principle it has been applied to codifications;<sup>107</sup> whilst, on the other

<sup>102</sup> Johnston's Est., 33 Pa. St. 511.

<sup>103</sup> Herron v. Carson, 26 W. Va. 62.

<sup>104</sup> Cahall v. Cit. Mut. B'g Ass'n, 61 Ala. 232; Rhoads v. B'g Ass'n, 82 Pa. St. 180; Booz's App., 109 Id. 592. See Endl., Build. Ass'ns, § 34 note.

<sup>105</sup> See in addition to above cases, Norris v. Crocker, 13 How. 429; U. S. v. Tynen, 11 Wall. 88; King v. Cornell, 106 U. S. 395; U. S. v. Cheeseman, 3 Sawyer, 424; U. S. v. Barr, 4 Id. 254; Excelsior Petrol. Co. v. Embury, 67 Barb. (N. Y.) 261; Goodenow v. Buttrick, 7 Mass. 140; Com'th v. Cooley, 10 Pick. (Mass.) 39; Ill., etc., Canal v. Chicago, 14 Ill. 334; Andrews v. People, 75 Id. 605; State v. Conkling, 19 Cal. 501; Farr v. Brackett, 30 Vt. 344; Giddings v. Coxe, 31 Id. 60; Wakefield v. Phelps, 37 N. H. 295;

Dowell v. State, 58 Ind. 333; State v. Studt, 31 Kan. 245; Pulaski Co. v. Downer, 10 Ark. 588; State v. Rogers, 10 Nev. 319; but see Hogan v. Guigon, 29 Gratt. (Va.) 705. And see an elaborate discussion of this subject, with profuse citation of decisions, Bish., Wr. Laws, §§ 158-163a.

<sup>106</sup> See People v. Carr, 36 Hun (N. Y.) 488; Weiss v. Mauch Chunk Iron Co., 58 Pa. St. 295, 302; Com'th v. Cromley, 1 Ashm. (Pa.) 179; Prince George Co. v. Laurel, 51 Md. 457; Gorham v. Linckett, 6 B. Mon. (Ky.) 146; Rogers v. Watrous, 8 Tex. 62; Stirman v. State, 21 Id. 734; Harold v. State, 16 Tex. App. 157.

<sup>107</sup> See State v. Harris, 10 Iowa 441; Ripley v. Gifford, 11 Id. 367; Barker v. Bell, 46 Ala. 216; Hartley v. Hartley, 3 Metc. (Ky.) 56; Thorpe v. Schooling, 7 Nev. 15.

hand, the repealing effect of revising statutes and codifications has been frequently limited to such matters embraced in the old law as were omitted in the new,<sup>108</sup> or permitted to operate only in cases of manifest repugnancy<sup>109</sup> and not beyond the immediate object of the codification,<sup>110</sup> and even a failure to incorporate a statute in a revision was held not to be a repeal of it, where the act directing the revision declared that "all acts . . . in force at the commencement of the . . . session . . . shall be . . . continued in full force and effect, unless . . . repugnant to the acts passed or revised" at the same.<sup>111</sup> But the general rule seems to be that statutes and parts of statutes omitted from a revision are to be considered as annulled, and are not to be revived by construction.<sup>112</sup>

§ 203. **Qualifications of Foregoing Rules.**—[Where a statute of a state prescribes, as a rule of construction, that the provisions of any statute, so far as they are the same as any prior statute, are to be regarded as a continuation of the same, and not as a new enactment,<sup>113</sup> an act revising and consolidating former acts, and re-enacting their provisions in the same words, must, although expressly repealing the earlier statutes, be construed as a continuation of them.<sup>114</sup> And the rule of implied repeal is clearly inapplicable, also, where

<sup>108</sup> See *Bracken v. Smith*, 39 N. J. Eq. 169; *Georgia R. R. Co. v. Kirkpatrick*, 35 Ga. 144; *State v. Judge*, 37 La. An. 578.

<sup>109</sup> *Lyon v. Fisk*, 11 La. An. 444.

<sup>110</sup> *Whitehead v. Wells*, 29 Ark. 99; and see *Needham v. Thresher*, 49 Cal. 393.

<sup>111</sup> *Cape Girardeau Co. Ct. v. Hill*, 118 U. S. 68. See *infra*, § 203.

<sup>112</sup> See *Ellis v. Paige*, 1 Pick. (Mass.) 43, 45; *Rutland v. Mendon*, Id. 154; *Blackburn v. Walpole*, 9 Id. 97; *Stafford v. Creditors*, 11 La. An. 470; *Pingree v. Snell*, 42 Me. 53; *Broadbuss v. Broadbuss*, 10 Bush (Ky.) 299; *Campbell v. Case*, 1 Dak. 17; *Tafuya v. Garcia*, 1 New Mex. 480. See, however, as to slight variations of language in re-enactments, etc., post, §§ 378-381.

<sup>113</sup> Such a rule seems now to obtain, as to acts repealed or re-enacted by a code or other revision, in Massachusetts, Wisconsin, Minnesota, Kentucky, Missouri, Washington Ter. Idaho Ter. and Utah Ter., and, generally, in Illinois, Kansas, Texas and California: see *Stimson, Amer. Stat. Law*, p. 143, § 1043. But see *Ibid.*, that no statute is considered in force merely because consistent with the provisions of the Code, but is held repealed unless expressly continued in force by the code or other revision, in Iowa, North Carolina, Tennessee, Texas, California, Mississippi, and Washington, Dakota and Montana Territories. Expressly otherwise, however, in Missouri and South Carolina.

<sup>114</sup> *Scheftels v. Tabert*, 46 Wis.

the revising statute declares what effect it is intended to have upon the former law ; as, where it declares that it shall operate as a repeal of such provisions of earlier acts as are inconsistent with it, which is regarded as a declaration that it shall repeal only such provisions and leave unaffected such as are not inconsistent.<sup>115</sup> The question of implied repeal being, after all, a question of implied intention,—where the Legislature expressly declares what effect, in the way of repeal, an act is intended to have, there is no room for any implication.<sup>116</sup> It has even been held, that a specific repeal by one statute of a particular section of another raises a clear implication that no further repeal is intended,<sup>117</sup> unless there is an absolute inconsistency between other provisions of the two statutes.<sup>118</sup> But, where there is such a repugnancy between the provisions of a later act revising the whole subject matter of several former ones and expressly repealing one of them, and the provisions of another not expressly repealed, the latter will nevertheless be abrogated by implication.<sup>119</sup> A revisal repealing all acts repugnant to the provisions thereof, cannot affect statutes which are omitted and which are not repugnant to its provisions.<sup>120</sup> Moreover, to ascertain the effect of a revision, in this particular, it is necessary to “put together and construe as one act the act which authorized the compilation, and the act which subsequently put the revisal into operation.”<sup>121</sup> And where the former gave the compilers no authority to omit

439. And see *State v. Co. Ct.*, 53 Mo. 128. But see *Emporia v. Norton*, 16 Kan. 236, where, under such a rule of construction, “unless such construction would be inconsistent with the manifest intention of the Legislature,” it was held, that a statute enacted in the same terms as a former one, which had accomplished its entire purpose and exhausted its force, should not be construed as a continuation of the same.

<sup>115</sup> *Patterson v. Tatum*, 3 Sawyer, 164; *Lewis v. Stout*, 22 Wis. 234; *Gaston v. Merriam*, 33 Minn. 271. But see *U. S. v. Cheeseman*, 3 Sawyer, 424.

<sup>116</sup> Thus, where an act expressly repealed so much of a former one as provided, etc., it was held that there could be no implication of an intention to repeal anything beyond: *Purcell v. N. Y. Life Ins. Co.*, 42 N. Y. Super. Ct. 333.

<sup>117</sup> *State v. Morrow*, 26 Mo. 131. See also *Kilgore v. Com'th*, 94 Pa. St. 495, post, § 227. And comp. § 398.

<sup>118</sup> *Crosby v. Patch*, 18 Cal. 438. <sup>119</sup> *Prince George Co. v. Laurel*, 51 Md. 457.

<sup>120</sup> *State v. Pollard*, 6 R. I. 290.

<sup>121</sup> *State v. Cunningham*, 72 N. C. 469, 476.

any, but directed a compilation of all, laws in force, and the latter repealed "all acts and parts of acts the subjects whereof are digested in this revisal or which are repugnant to the provisions thereof," an act, which is neither brought forward in the revisal nor repugnant to its provisions, is, of course, not repealed by it.<sup>122</sup>

§ 204. **Implied Repeal of Common Law.**—[The principle under discussion applies not only to statute law, but also to the common law, the latter being deemed superseded by a statutory revision of the entire subject,<sup>123</sup> either when it is couched in negative terms, or when its affirmative provisions are inconsistent with the continued operation of the common law.<sup>124</sup>

[Similarly where a statute enacted by the Legislature of a state covers the entire subject matter of a statute theretofore in force in the state, deriving its authority from an enactment of the Legislature of another state or nation of which the state was formerly a part, or to which it was subject, the older law, though not expressly repealed, is deemed abrogated.<sup>125</sup>

§ 205. **Limits of Extent of Repeal by Implication.**—[But, in all matters of repeal resulting by implication, from an affirmative act except where the intent, appearing from a design to substitute the new law for the old, in toto, is clearly to the contrary, it must be remembered that the repeal extends only so far as the provisions of the statutes affecting each

<sup>122</sup> Ibid. Such a conclusion is strengthened by a consideration of the obvious impossibility of making any revision so complete as to embrace all general laws,—an impossibility recognized, in spite of the fact that the revision of statutes raises a presumption that it was intended to establish a complete code of laws, by a provision of an adopting clause that statutes of a general nature which are not repugnant to the revision should remain in force : *Com'th v. Mason*, 82 Ky. 256.

<sup>123</sup> *Com'th v. Cooley*, 10 Pick. (Mass.) 87; *Com'th v. Marshall*, 11 Id. 350; *State v. Boogher*, 71 Mo. 631 (where it is held that a statute

making an act, which was an offence at common law, an offence by statute, repeals the common law). But see *Washington, etc., Road v. State*, 19 Md. 239 (where it is held that an act fixing a penalty for an offence, but neither expressly nor by necessary implication destroying the common law remedy, is cumulative merely). Compare post, §§ 463, et seq.

<sup>124</sup> *State v. Norton*, 23 N. J. L. 33; *State v. Wilson*, 43 N. H. 415.

<sup>125</sup> *Mason v. Waite*, 1 Pick. (Mass.) 452 (the case of an English statute); *Towle v. Marrett*, 3 Greenl. (Me.) 22 (of a Massachusetts act).

other are inconsistent; the old law being, in all other respects, left in full force and effect.<sup>126</sup> Whatever portions of the old law may be incorporated with the new, as being consistent with the latter, must be deemed to remain in force.<sup>127</sup> Thus, an act amending the charter of a town and giving to the mayor and aldermen the exclusive right to grant licenses for the sale of spirituous liquors, would not supersede the general law requiring the application for a license to retail to be recommended by a majority of the legal voters.<sup>128</sup> And] if one act imposed a toll, payable to turnpike trustees, for passing along a road, and another transferred the duty of repairing the road to another body, prohibiting also the trustees from repairing it, the toll would not be thereby impliedly repealed (*a*).

[This is so, indeed, even where the later act contains an express repeal of "all inconsistent" acts, etc.<sup>129</sup>]

§ 206. **Expressed Intention to Repeal.**—Yet, where a statute contemplates in express terms that its enactments will repeal earlier acts, by their inconsistency with them, the chief argument or objection against repeal by implication is removed, and the earlier acts may be more readily treated as repealed. Thus, after a local act had directed the trustees of a turnpike to keep their accounts and proceedings in books to which "all persons" should have access, the General Turnpike Act, which recited the great importance that one uniform system should be adhered to in the laws regulating turnpikes, and enacted that former laws should continue in force, except as they were thereby varied or repealed,

<sup>126</sup> Wood v. U. S., 16 Pet. 342; McCool v. Smith, 1 Black 459; Mongeon v. People, 55 N. Y. 613; Sullivan v. People, 15 Ill. 233; Watson v. Kent, 78 Ala. 602; Pub. School Trustees v. Trenton, 30 N. J. Eq. 667; *Re* Contested Election of Barber, 86 Pa. St. 392; Connors v. Iron Co., 54 Mich. 168; Elrod v. Gilliland, 27 Ga. 467; Coats v. Hill, 41 Ark. 149 (where an act to quiet land titles was held not repealed by the general revenue laws, which contained nothing inconsistent with the former, except as to the time in which a tax title

must be assailed, and the amount to be paid by the purchaser).

<sup>127</sup> Daviess v. Fairbairn, 3 How. 636.

<sup>128</sup> House v. State, 41 Miss. 737.

(*a*) Phipson v. Harvett, 1 C. M. & R. 473. Comp. Brown v. G. W. R. Co., 51 L. J. Q. B. 529.

<sup>129</sup> People v. Durick, 20 Cal. 94; and see also Hickory Tree Road, 43 Pa. St. 139. And a statute repealing all former acts within its purview does not, as to matters not provided for by itself, repeal the provisions of former laws: Payne v. Connor, 3 Bibb (Ky.) 180.

directed that the trustees should keep their accounts in a book to be open to the inspection of the trustees and creditors of the tolls, and that the book of their proceedings should be open to the inspection of the trustees; it was held that the power of inspection of proceedings given by the first act to "all persons" was repealed (*a*). [Thus a declaration in a general law that all acts or parts of acts, whether local or special, or otherwise, inconsistent with its provisions, are to be deemed repealed, will repeal inconsistent provisions even in special acts.<sup>130</sup> And where an act expressly repealed certain designated sections of the Revised Statutes of the state, and in general terms all previous acts in conflict with it, it was held that it repealed every previous act identical with any of those expressly repealed.<sup>131</sup>]

§ 207. **Acts Conferring Conflicting Rights, etc.**—A later Act which conferred a new right, would repeal an earlier one, if the co-existence of the right which it gave would be productive of inconvenience; for the just inference from such a result would be that the Legislature intended to take the earlier right away (*b*). [A statute fixing a salary different from one prescribed by a former act, by necessary implication repeals the latter.<sup>132</sup>] The Point Stock Banking Act of 7 Geo. 4, c. 46, which besides limiting and varying the common law liabilities of members of banking companies, provided that suits against such companies should and lawfully might be instituted against the public officer, was held to take away by implication the common law right of suing the individual members (*c*), for from the nature of the case, this must have been what the Legislature intended (*d*). [But not only does the grant of a power by the Legislature inconsistent with a former one repeal the latter,<sup>133</sup> but in

(*a*) *R. v. Northleach*, 5 B. & Ad. 978.

<sup>130</sup> *State v. Williamson*, 44 N. J. L. 165. See post, §§ 223, et seq.

<sup>131</sup> *State v. Barrow*, 30 La. An., P. I. 657.

(*b*) See inf. §§ 245, 251, seq.

<sup>132</sup> *Pierpont v. Crouch*, 10 Cal. 315.

(*c*) *Steward v. Greaves*, 10 M. & W. 711; *Chapman v. Milvain*, 5

Ex. 61, 1 L. M. & P. 209; *Davison v. Farmer*, 6 Ex. 252; *O'Flaherty v. McDowell*, 6 H. L. 142. See also *Green v. R.*, 1 App. (H. L.) 513. *Roles v. Rosewell*, and *Hardy v. Bern*, 5 T. R. 538.

(*d*) *Per* Lord Cranworth in *O'Flaherty v. McDowell*, 6 H. L. 157. See *Cowley v. Byas*, 5 Ch. D. 944.

<sup>133</sup> *Korah v. Ottawa*, 32 Ill. 121.



general, the grant of a power conditioned on different things,—*e. g.*, where an act providing for appeals from the assessment of railroad damages gave thirty days after confirmation of the report of viewers from the entry of an appeal, and a subsequent one upon the same subject gave thirty days from the *filing* of the report for the same purpose,—the latter was held to repeal the former.<sup>134</sup>

[But, as a question of legislative intent, it has been held, that, where a statute, the manifest object of which was to extend a benefit, or create a right, was passed under a misapprehension, or in ignorance of the existence or effect of a former law, which gave a greater benefit, or created a greater right than the new law, the latter should not be held to affect the former, so as to repeal the right or benefit, unless an intention appeared upon it that the limits fixed by it, and nothing beyond, should regulate the matter, and that the rights and benefit conferred by it and no greater, should be enjoyed.<sup>135</sup>]

§ 208. **Effect of Inconvenience and Incongruity between Acts.**—In other circumstances, also, the inconvenience or incongruity of keeping two enactments in force has justified the conclusion that one impliedly repealed the other, for the Legislature is presumed not to intend such consequences. Thus, the 9 Geo. 4, c. 61, which prohibited keeping open public-houses during the hours of afternoon divine service, was held repealed by implication *pro tanto* by the 18 & 19 Vict. c. 118, which prohibited the sale between three and five o'clock P. M., the usual hours of afternoon divine service. If both Acts had co-existed, it would have been in the power of the clergyman of every parish to close the public-houses for four hours instead of two, by beginning the afternoon service at one or at five P. M., an intention too singular to be lightly attributed to the Legislature (*a*). [So,

<sup>134</sup> *Gwinner v. R. R. Co.*, 65 Pa. St. 126. See also *New Haven v. Whitney*, 36 Conn. 373; *District Township, etc. v. Dubuque*, 7 Iowa, 272.

<sup>135</sup> *Tyson v. Postlethwaite*, 13 Ill. 727. That, however, mere presumptive ignorance of the existence of an act by the Legislature will not prevent its repeal by

implication from a later act, see *Johnston's Est.*, 33 Pa. St. 511.

(*a*) *R. v. Whiteley*, 3 H. & N. 143; *Whiteley v. Heaton*, 27 L. J. M. C. 217, S. C. See *Harris v. Jenns*, 9 C. B. N. S. 152; 30 L. J. 183; *R. v. Senior*, L. & C. 401, 32 L. J. M. C. 125. *R. v. Bucks*, 1 E. & B. 447; *R. v. Knapp*, 22 L. J. M. C. 139, S. C. See another

too, where a statute in incorporating a corporation declared that the charter granted by it should be forfeited by failure of the company to organize and commence business within one year from the passage of the incorporating act, and subsequently, eighteen days before the expiration of the period thus limited, the organization not having been perfected, nor business commenced, an act was passed amending the charter containing the directors in office for a year, and authorizing the stock subscription book to be again opened; it was held that the fair construction of the latter act was that it operated to repeal the limitation contained in the original act and to give the company one year from the time of its passage for perfecting its organization and commencing its business, it being wholly improbable that the Legislature intended that the company should do both within the short space of eighteen days.<sup>136</sup>]

**§ 209. Effect of Later Legislation as Showing Intent to Repeal.**

—An intention to repeal an Act may be gathered from its repugnancy to the general course of subsequent legislation.<sup>137</sup> Thus the 7 Geo. 1, c. 21, which prohibited bottomry loans by Englishmen to foreigners on foreign ships engaged in the Indian trade, was held to have been silently repealed by the subsequent enactments which put an end to the monopoly of the East India Company, and threw its trade open to foreign as well as to all British ships (a).

[As an instance of the operation of this rule may be mentioned the effect which has been given by the courts of various jurisdictions to the statutes enabling married women to sue and be sued, upon the exemptions contained in their favor in the statutes of limitations. Where such powers are conferred upon married women, it is said that "the various provisions that coverture shall be one of the disabilities in case of which time does not run against the plaintiff, can no

example of a similar kind, in *Manchester (Mayor) v. Lyons*, 22 Ch. D. 277.

<sup>136</sup> *Johnson v. Bush*, 3 Barb. Ch. (N. Y.) 207, 238.

<sup>137</sup> As has been seen, ante § 47, an intention that a certain act was not to operate as a repeal of another may be inferred from the

fact that the latter was expressly repealed by a still later one.

(a) *The India, Br. & L.* 221. See also *R. v. Northleach*, 5 B. & Ad. 978. Comp. *per Ex. Ch.* in *Shrewsbury v. Scott*, 6 C. B. N. S. 1. See another illustration in 32 & 33 Vict. c. 68; *Re Yearwood's Trusts*, 5 Ch. D. 545.

longer be held to apply."<sup>138</sup> They have accordingly been held to be silently repealed by the English Married Women's Property Act of 1882.<sup>139</sup> The same effect has been given to the Illinois married woman's act of 1861,<sup>140</sup> and approved by the Supreme Court of the United States,<sup>141</sup> declaring that the powers conferred by the act so completely annihilate the existence of every reason for the exemption, that it would be absurd to hold that the two acts could stand together.<sup>142</sup> Similar effect has been held to follow the enactment of the California statute enabling married women;<sup>143</sup> and so in Ohio,<sup>144</sup> and in Maine.<sup>145</sup> This effect has, however, been denied to similar enactments in Mississippi,<sup>146</sup> North Carolina<sup>147</sup> and Arkansas.<sup>148</sup>

[But the repeal of a statute is not to be implied from the mere fact that some of the evils provided against in it are subsequently removed.<sup>149</sup> Hence where an act passed in 1847 required the sheriff of a certain county to hold certain municipal elections on a designated day "in each and every year," and fixed a penalty for his neglect to do so; and an act passed in 1849 provided for the holding of such elections at any other times than those appointed by the act of 1847, if omitted to be held on the proper day, it was decided that the act of 1849 did not repeal the provisions of that of 1847 as to the duty of the sheriff and the penalty incurred by him by neglect thereof.<sup>150</sup>]

<sup>138</sup> Thicknesse, H. & W., at p. 219.

<sup>139</sup> Weldon v. Neal, 51 L. T., N. S., 289; 32 W. R. 828; Lowe v. Fox, (C. A.) L. R. 15 Q. B. D. 667.

<sup>140</sup> Haywood v. Gunn, 82 Ill. 385; Castner v. Walrod, 83 Id. 171. Enos v. Buckley, 94 Id. 458; Geisen v. Heiderich, 104 Id. 537 (exception in favor of married women in act relating to prosecution of writs of error.)

<sup>141</sup> Kibbe v. Ditto, 93 U. S. 674.

<sup>142</sup> Ibid., at p. 678.

<sup>143</sup> Cameron v. Smith, 50 Cal. 303.

<sup>144</sup> Ong v. Sumner, 1 Cinc. Super. Ct. 424.

<sup>145</sup> Brown v. Conseno, 51 Me. 301.

<sup>146</sup> McLaughlin v. Spengler, 57 Miss. 818.

<sup>147</sup> State v. Smith, 83 N. C. 306; State v. Troutman, 72 Id. 551.

<sup>148</sup> Hershey v. Latham, 42 Ark. 305. In New York, under the acts enabling married women to sue, it was at first held that the exceptions in their favor in the statutes of limitations were rendered in applicable: Ball v. Bullard, 52 Barb. 141; but this doctrine was subsequently questioned: see Clark v. McCann, 18 Hun 13; Dunham v. Sage, 52 N. Y. 229; and the matter was finally set at rest by the act of 1870, ch. 741, dropping coverture from the enumeration of disabilities: Acker v. Acker, 81 N. Y. 143, and see Clarke v. Gibbons, 83 Id. 107.

<sup>149</sup> Alexandria v. Dearmon, 2 Sneed (Tenn.) 104.

<sup>150</sup> Ibid.

## CHAPTER VIII.

PRESUMPTION AGAINST REPEAL BY IMPLICATION. GENERAL,  
SPECIAL AND PENAL ACTS.

- § 210. Repeal by Implication not Favored.
- § 211. Conflict between Acts often merely Apparent.
- § 215. Modification to Escape Repeal. Exceptions.
- § 217. Negative Statutes Affirmative Inter se.
- § 218. Statutes without Expressed or Implied Negative.
- § 222. Acts merely giving Direction and Application to Old Law.
- § 223. Generalia Specialibus Non Derogant.
- § 226. Merely Seeming Repugnancy between General and Special Acts.
- § 227. Personal and Local Acts.
- § 228. Charters, etc. Municipal Corporations.
- § 229. Corporations Other than Municipal.
- § 230. When General Act Repeals Special.
- § 231. Effect of General Act Intended to Furnish Exclusive Rule.
- § 232. General Act in Terms Applying to Subject of Special Act.
- § 233. Special Act Incorporating Provisions of General Act.
- § 234. Implied Repeal between Special Acts.
- § 235. No Implied Repeal between Penal Acts where Objects not Identical.
- § 236. Cumulative Punishments and Procedure.
- § 237. Change in Locality and other Incidents of Punishment.
- § 238. Change in Quality and Incidents of Offence.
- § 239. Change in Degree of Punishment.
- § 240. Where Degree of Crime is Preserved.
- § 241. Statute Covering whole Subject Matter.
- § 243. Revenue Laws.
- § 244. Secondary Meaning.

§ 210. Repeal by Implication not Favored.—But repeal by implication is not favoured (a). It is a reasonable presump-

(a) Foster's Case, 11 Rep. 63a. [McCool v. Smith, 1 Black, 495; U. S. v. 67 Packages, 17 How. 83; U. S. v. Walker, 22 Id. 209; U. S. v. 25 Cases, Crabbe, 356; U. S. v. 100 Barrels, 2 Abb. U. S. 305; Bowen v. Lense, 5 Hill (N. Y.) 221; Catta-raugus Co. v. Willey, 2 Lans. (N.

Y) 427; People v. Van Nort, 64 Barb. (N. Y.) 205; McCarter v. Orph. Asylum, 9 Cow. (N. Y.) 437; N. Y., etc., Ry. Co. v. Supervisors, 67 How. Pr. (N. Y.) 5; Chamberlain v. Chamberlain, 43 N. Y. 424; People v. St. Lawrence Co., 103 N. Y. 541; Loker v. Brookline,

tion that the Legislature did not intend to keep really contradictory enactments in the statute-book, or to effect so important a measure as the repeal of a law without expressing an intention to do so. Such an interpretation, therefore, is not to be adopted unless it be inevitable. Any reasonable construction which offers an escape from it is more likely to be in consonance with the real intention. [Hence it is, a rule founded in reason as well as in abundant authority, that, in order to give an act not covering the entire ground of an earlier one, nor clearly intended as a substitute for it the effect of repealing it, the implication of an intention to repeal must necessarily flow from the language used, disclosing a repugnancy between its provisions and those of the earlier law, so positive as to be irreconcilable by any fair, strict or liberal, construction of it, which would, without destroying its evident intent and meaning, find for it a reasonable field of operation, preserving, at the same time, the force of the earlier law, and construing both together in harmony with the whole course of legislation upon the subject.<sup>1</sup> And it may be here stated, that the same rule

13 Pick. (Mass.) 343; Haynes v. Jenks, 2 Id. 172; Goddard v. Boston, 20 Id. 407; Snell v. Bridgewater, etc., Co., 24 Id. 296; McDonough v. Campbell, 42 Ill. 490; Hume v. Gossett, 43 Id. 297; People v. Barr, 44 Id. 198; Hyde Park v. Oakwood Cem'y Ass'n, 119 Id. 141; Casey v. Harned, 5 Iowa 1; State v. Berry, 12 Id. 58; Burke v. Jeffries, 20 Id. 145; Wyman v. Campbell, 6 Port. (Ala.) 219; Horton v. School Comm'rs, 43 Ala. 598; Parker v. Hubbard, 64 Id. 203; Riggs v. Brewer, Id. 282; McAfee v. R. R. Co., 36 Miss. 669; Naylor v. Field, 29 N. J. L. 287; Walter's App., 70 Pa. St. 392; Erie v. Bootz, 72 Id. 196; Rhein Build'g Ass'n v. Lea, 100 Id. 210, 213-4; Osborne v. Everitt, 103 Id. 421; Harrisburg v. Sheck, 104 Id. 53; People v. R. R. Co., 28 Cal. 258; Kerlinger v. Barnes, 14 Minn. 526; Goodrich v. Milwaukee, 24 Wis. 422; State v. Morrow, 26 Mo. 131; State v. Bishop, 41 Id. 16; State v. Draper, 47 Id. 29; St. Louis v. Ins. Co., Id. 146; State v. Jaeger, 63 Id. 403;

Robbins v. State, 8 Ohio St. 311; Buckingham v. Steubenville, 10 Id. 25; Lichtenstein v. State, 5 Ind. 162; Blain v. Bailey, 25 Id. 165; Com'th v. Mason, 82 Ky. 256; State v. Woodside, 9 Ired. L. (N. C.) 496; Erwin v. Moore, 15 Ga. 361; Connor v. Exp. Co., 37 Id. 397; Gillette v. Shark, 7 Nev. 245; Hockaday v. Wilson, 1 Head (Tenn.) 113; Furman v. Nichols, 3 Coldw. (Tenn.) 432; Smith v. Hickman, Cooke (Tenn.) 330; Rogers v. Watrous, 8 Tex. 62; Stirman v. State, 21 Id. 734; Gill v. State, 30 Id. 514; Schwenke v. R. R. Co., 7 Col. 512; and see cases cited *infra*.]

<sup>1</sup> See Wood v. U. S., 16 Pet. 342; McCool v. Smith, 1 Black. 459; Beals v. Hale, 4 How. 37; Furman v. Nickol, 8 Wall. 44; Exp. Yerger, Id. 85; U. S. v. Henderson's Tobacco, 11 Id. 652; Clay Co. v. Soc'y, 104 U. S. 579; Louisiana v. Taylor, 105 Id. 454; Red Rock v. Henry, 106 Id. 596; Exp. Crow, Dog, 109 Id. 556; Chew Heong v. U. S., 112 Id. 536; Chamberlain v. Chamberlain, 43

applies equally to questions arising between different parts and sections of the same enactment."]

§ 211. **Conflict between Acts often merely Apparent.**—It is sometimes found that the conflict of two statutes is apparent, only, as their objects are different, and the language of each is therefore restricted, as already pointed out, to its own object or subject. When their language is so confined, they run in parallel lines, without meeting. Thus the real property statute of limitations, 3 & 4 Will. 4, c. 27, which limits the time for suing for the recovery of land (which is defined to include tithes) to twenty years after the right accrued, was found not to affect the provision of the Act of the preceding session, 2 and 4 Will. 4, c. 100, which enacts that claims to exemption from tithes shall be valid after non-payment for thirty years; for the former Act dealt with conflicting claims to the right of receiving tithes which are admittedly payable; while the latter related to the liability to pay them (a). So, the 1

N. Y. 424; *Re The Evergreens*, 47 Id. 216; *Kingsland v. Palmer*, 53 Id. 83; *People v. St Lawrence Co.*, 108 N. Y. 541; N. Y., etc., *Ry. Co. v. Superv's*, 67 How. Pr. (N. Y.) 5; *Roberts v. Fahs*, 36 Ill. 268; *People v. Barr*, 44 Id. 198; *Fowler v. Pirkins*, 77 Id. 271; *Iverson v. State*, 52 Ala. 170; *Riggs v. Brewer*, 64 Id. 282; *Comm'l B'k v. Chambers*, 16 Miss. 9; *Richards v. Patterson*, 30 Id. 583; *State v. Blake*, 35 N. J. L. 208; *Morris v. Del., etc., Canal*, 4 Watts. & S. (Pa.) 461; *Street v. Com'th*, 6 Id. 209; *Dickinson v. Dickinson*, 61 Pa. St. 401; *Erie v. Bootz*, 72 Id. 196; *Williamsport v. Brown*, 84 Id. 488; *Re Cont. Elect'n of Barber*, 86 Id. 392; *Com'th v. Ry. Co.*, 98 Id. 127; *Wayne Co.'s App.*, 4 W. N. C. (Pa.) 411; *Merrill v. Gorham*, 6 Cal. 41; *Pratt v. R. R. Co.*, 42 Me. 579; *Atty.-Gen. v. Brown*, 1 Wis. 513; *State v. Mister*, 5 Md. 11; *Billingslea v. Baldwin*, 23 Id. 85; *State v. Bishop*, 41 Mo. 16; *Ludlow v. Johnston*, 3 Ohio, 553; *Blain v. Bailey*, 25 Ind. 165; *Water Works Co. v. Burkhart*, 41

Id. 364; *Carver v. Smith*, 90 Id. 222; *Connor v. Expr. Co.*, 37 Ga. 397; *Lawson v. Gibson*, 18 Neb. 137; *State v. Babcock*, 21 Id. 599; *Kollenberger v. People*, 9 Col. 233; *Walker v. State*, 7 Tex. App. 245; *Forqueron v. Donnally*, 7 W. Va. 114; *Lybbe v. Hart*, L. R. 28 Ch. D. 15; and see cases in preceding note. It is said that the exposition of statutes passed at the same session, though apparently conflicting, but not directly repugnant, should be such as to give effect to what appears to be the main intent of the law maker: *La Grange Co. v. Cutler*, 6 Ind. 354.

<sup>2</sup> *Wilcox v. State*, 3 Heisk. (Tenn.) 110; and see *Brown v. Co. Comm'rs*, 21 Pa. St. 37. Compare also on this subject, generally, ante, §§ 182, 183, 187-189, 192, 195-196.

(a) *Ely (Dean of) v. Cash*, 15 M. & W. 617. In the one case, tithe was real property, in the other, a chattel: *Ely (Dean of) v. Bliss*, 2 De G., M. & G. 459. See also *R. v. Everett*, 1 E. & B. 273; *Adey v. Trinity House*, 22 L. J.

& 2 Vict. c. 110, s. 13, which enacted that a judgment against any person should operate as a charge on "lands, rectories, advowsons, tithes," and hereditaments in which the judgment debtor had an interest, was held to be limited to the property of debtors who had the power of charging their property, that is, to lay rectories, advowsons and tithes, and so did not conflict with or repeal by implication the 13 Eliz. c. 10, which makes void all chargings of ecclesiastical property in ecclesiastical hands (*a*). [So, where section seven of an act conferred upon a married woman an absolute power to dispose of her separate estate by will, apparently even to the exclusion of her husband, and section nine provided, that upon her failure to do so, her estate should be distributed in certain proportions among her children and her husband, as the consequence of intestacy; and a subsequent act provided, "that the power of any married woman to bequeath or devise her property by will shall be restricted, as regards the husband, to the same extent as the husband's power to dispose of his property is restricted as regards the wife," etc., it was held that, as the subject of the latter act was merely the case of the husband of a deceased wife who left a will, it did not repeal section nine of the former act, which ascertained the mutual rights of husband and children where there was no will.<sup>3</sup>]

§ 212. The Act which provides one course of proceeding for the habitual neglect to send a child to school, does not conflict with another which provides a different mode of proceeding for a neglect which was not habitual but occasional only, and both therefore can stand (*b*). The 55 Geo. 3, c. 137, which imposed a penalty of 100*l.*, recoverable by the common informer by action, on any parish officer who, for his own profit, supplied goods for the use of a work-

Q. B. 3, S. C.; Hunt v. Gr. Northern R. Co., 10 C. B. 900, 2 L. M. & P. 268 and 271; Grant v. Ellis, 9 M. & W. 113; Manning v. Phelps, 10 Ex. 59, 24 L. J. 62; Harden v. Hesketh, 4 H. & N. 175, 28 L. J. 137. Comp. R. v. Everett, 1 E. & B. 273, 22 L. J. 3; Re Knight, 1 Ex. 802.

(*a*) Hawkins v. Gathercole, 6

McN.; De G. & G. 1, 11 24 L. J. Ch. 332.

<sup>3</sup> Dickinson v. Dickinson, 61 Pa. St. 401. See also, for an illustration of this principle: Street v. Comm'rs, 6 Watts & S. (Pa.) 209.

(*b*) Re Murphy, 2 Q. B. D. 397. See another, Exp. Attwater, 5 Ch. D. 27.

house, or for the support of the poor, was held unaffected by the 4 & 5 Will. 4, c. 76, s. 77, which inflicted a fine of 5*l.*, recoverable summarily, half for the informer and half for the poor rates, on any such officer who supplied goods for his profit to an individual pauper (*a*). It had been decided before the passing of the later Act (which, indeed, was passed in consequence of that decision), that the earlier enactment applied only to a supply for the poor generally, but not to the supply of an individual pauper (*b*). [So, where an act forbade the issuing of land warrants except for land whereon settlement and certain improvements had been made; and a subsequent one enacted, that, in all cases where warrants had issued under said act and surveys been made and filed, patents should issue therefor without further evidence of settlement and improvement than that upon which the warrant was granted, it was held, that, as the only object of the act was to make the original proof sufficient to authorize the issuing of the patent, for the sake of convenience, and to obviate certain scruples entertained by the secretary of the land office, it was not to be construed as repealing by implication the earlier act, or to establish titles obtained in fraud of it.<sup>4</sup> The Massachusetts act of 1862, ch. 198, required a married woman engaging in business on her separate account to file a certain certificate, and it was held, that her failure to do so subjected her earnings in the business to attachment by her husband's creditors;<sup>5</sup> the act of 1874, ch. 184, enlarged the powers of a married woman as to transfers of personal and real estate, contracts, ownership of the earnings of her work and labor, suits, right to act as administratrix, etc., but did not touch upon the subject of her rights and liabilities when carrying on business on her separate account. The latter act was consequently held not to repeal the former by implication, both acts being capable of standing together, each as the governing rule in the class of cases to which it applied.<sup>6</sup> An act clothed cer-

(*a*) Robinson v. Emerson, 4 H. (Pa.) 171.  
& C. 852.

(*b*) Proctor v. Manwaring, 3 B. 421.  
& A. 145.

<sup>4</sup> Moyer v. Gross, 2 Penr. & W. 11.

<sup>5</sup> See Dawes v. Rodier, 125 Mass.

<sup>6</sup> Harned v. Gould, 126 Mass.



tain courts with power to decree such alteration in the charters of boroughs as might be needful to change the limits of such, upon like proceedings, as were required for the incorporation of boroughs; a subsequent act directed the burgess and councils of boroughs incorporated under it, upon petition of not less than twenty freeholders, owners of lots in any section whereon the petitioners and others might reside, adjacent to the borough, to declare by ordinance the admission of such territory as part of the borough. "This," says the court, "provides for a single case, and upon no other conditions have the borough officers anything to do with changing borough limits. To hold that such an enactment repeals a prior one which authorized the courts to decree needful alterations of borough limits, whenever expedient, would be against all precedents."

§ 213. [So an act giving to non-resident plaintiffs the right to sue before justices of the peace, by a "long" summons, without first giving security for costs, was held not repealed by a later one giving them the right to sue by a "short" summons upon giving such security.\* So, where a general act regulating the granting of licenses for the sale of spirituous liquors, and prescribing penalties for the sale of such without license, contained a provision that it should not be held to authorize the sale of liquors in any municipality having special prohibitory laws, it was held that it did not, by implication, repeal the penalty appointed by a special law prohibiting the granting of licenses and the sale of liquors in a certain township; the penalty in the later act being imposed upon the sale of liquors absolutely, whilst, in the former, it was imposed upon the sale thereof without license, and it being hardly correct to say of one who sold liquor in a township in which there could be no license, that he sold without license,—the phrase implying that persons might be licensed.† And, where

\* *McFate's App.*, 105 Pa. St. 323, 326. See also *Maple Lake v. Wright Co.*, 12 Minn. 403.

† *Osborne v. Everitt*, 103 Pa. St. 421.

‡ *Seifried v. Com'th*, 101 Pa. St. 200, 202. But the word "pre-

side" in an act relating to the organization of courts does not necessarily imply that the judge directed to "preside" must have associates: *Smith v. People*, 47 N. Y. 330.

one act related to "idle persons, who, not having visible means of support, live without lawful employment," and another to idle and disorderly persons who neglect lawful business and habitually misspend their time by visiting houses of ill-fame, etc., it was held that there could be no inconsistency between them, so as to make one impliedly repeal the other.<sup>10</sup>]

§ 214. So, an Act which imposes, for police purposes, a penalty for retailing excisable liquors without a magistrate's license, would not be affected by an excise Act of later date, which, after imposing a duty on persons licensed by magistrates, provided that nothing which it contained should prohibit a person duly licensed to retail beer, from carrying on his business in a booth or tent, at a fair or race (a). [An act declaring that the expense of publishing notices of tax sales in certain counties shall not exceed a certain sum for each paper is not inconsistent with an earlier one fixing the price for such publication, the latter regulating the total, the former the individual figures.<sup>11</sup> A statute giving certain counties the right to issue bonds in aid of the construction of any railroad running through them, upon approval by a vote of the majority of the legal voters thereof, was not repealed by a subsequent act giving a number of counties, including, with others, those of the counties embraced in the former act, a similar authority upon a vote of the majority of legal voters "and a majority of the supervisors," it being the manifest intention of the Legislature to provide for different roads.<sup>12</sup> A statute imposing the penalty of a certain fine and minimum imprisonment for a first offence is not repealed by a subsequent statute providing, that, on conviction of such offence, the court may, in its discretion, impose the penalty either of the fine or the imprisonment, where the offender shall prove, to the satisfaction of the court, that he has not been before convicted of a similar

<sup>10</sup> Com'th v. Norton, 13 Allen (Mass.) 550.

(a) R. v. Hanson, 4 B. & A. 519; R. v. Downes, 3 T. R. 560. See Buckle v. Wrightson, 5 B. & S.

854, 34 L. J. 43; and Ash v. Lynn, L. R. 1 Q. B. 270.

<sup>11</sup> Crouch v. Hayes, 98 N. Y. 183.

<sup>12</sup> Red Rock v. Henry, 106 U. S. 596.

offence, and repealing all inconsistent acts,—the latter act applying only to cases where this is done.<sup>13</sup> And a statute prescribing and regulating the method of assessing taxes, and containing a general repeal of all laws relating to the subject, would not, upon the same principle, repeal another providing a remedy for an illegal tax.<sup>14</sup>

§ 215. **Modification to Escape Repeal. Exceptions.**—[Inconsistency between two statutes, or statutory provisions, in order to avoid a repeal by implication, is sometimes so treated that the later statute or provision is regarded as modifying the earlier in some particular respect, or taking certain things out of its operation,<sup>15</sup> as an exception to it.<sup>16</sup> Thus, in Alabama, before 1852, there was a statute in force fixing the salary of the quartermaster-general at \$200. In that year an act was passed making his compensation \$4 a day while in the execution of his duty and repealing the former statute. The general appropriation act, passed later at the same session, however, appropriated the sum of \$200 per annum for two years to be paid to the quartermaster-general. It was held that the effect of this legislation was to modify the operation of the act of 1852, by postponing it for two years, during which the officer was entitled to receive the sum specifically appropriated.<sup>17</sup>

§ 216. [Upon the ground of clearly expressed intention, it is obvious, that the terms of a later special act must control

<sup>13</sup> *Dolan v. Thomas*, 12 Allen (Mass.) 421.

<sup>14</sup> *Shear v. Columbia*, 14 Fla. 146.

<sup>15</sup> *Wilb.*, p. 320. *Comp.* § 240 and note 123.

<sup>16</sup> *Exp. Turner*, 24 S. C. 211, 214, as where one act requires all wills to be in writing, and a later permits nuncupative wills of a certain kind, etc.

<sup>17</sup> *Riggs v. Pfister*, 21 Ala. 469. In *Riggs v. Brewer*, 64 Id. 282, the facts were these: an act fixed the annual salary of an officer at \$2,000; the appropriation bill appropriated for 2 years, \$1,500 in each year, in all \$3,000 for his pay; the fiscal

year ending September 30, the appropriation was continued to January 1, succeeding; it was declared that these appropriations should not be construed to be in addition to appropriations for the same purposes made by any other laws: it was held that the officer could draw, during the 2 years, only \$1,500 annual salary, *Brickell, C. J.*, holding that the appropriation act repealed the general law; *Manning, J.*, that it suspended the operation of the general law, leaving the residue of the salary fixed by it to be provided for by a future appropriation. *Comp. State v. Bishop*, 41 Mo. 16, ante, § 45.

those of a prior general one ;<sup>18</sup> and that where they are positively repugnant, not merely cumulative or auxiliary, the former must repeal the latter to the extent of such repugnancy and within the limits assigned to the operation of the special law.<sup>19</sup> And so, where there are, in an act, specific provisions relating to a particular subject, they must govern, in respect of that subject, as against general provisions in other parts of the statute, although the latter, standing alone, would be broad enough to include the subject to which the more particular provisions relate.<sup>20</sup> As, however, mere particular expressions will not be allowed entirely to exclude a more general intent, clearly manifested by a statute,<sup>21</sup> so the effect of particular provisions upon more general ones overlapping them must also be a question of legislative intention. This intention is often best served by permitting the subject-matter of the particular provision to stand side by side with that of the general provision, in obedience to the rule:] Where a general intention is expressed, and also a particular intention which is incompatible with the general one, the particular intention shall be considered an exception to the general one (a). [According to a familiar, every-day maxim, an exception is not a negation of a general rule. At least, it is so only to the extent of the exception ;<sup>22</sup> and if a statute recognizes the existence of the general laws, and creates an exception from them, it cannot be deemed repugnant to the former so as to repeal it.<sup>23</sup> Hence, if there are two acts, or two provisions in the same act, of which one is special and particular, and

<sup>18</sup> *Townsend v. Little*, 109 U. S. 504 ; and see *Burke v. Jeffries*, 20 Iowa, 145 ; *Crane v. Reeder*, 22 Mich. 323. See *Addenda*.

<sup>19</sup> *State v. Kelly*, 34 N. J. L. 75 ; *McGavish v. State*, Id. 501 ; *Isham v. Iron Co.*, 19 Vt. 230 ; and see *Titcomb v. Ins. Co.*, 8 Mass. 327. But comp. *State v. Douglass*, 33 N. J. L. 363 ; *Com'th v. Pointer*, 5 Bush (Ky.) 301. It has been said that a section in a private act cannot, by implication, repeal a provision of the common law or of a public statute : *The Cian Gordon*, L. R. 7 P. Div. 190. At all events, a local act the purpose of which is to repeal, as to a particular

county, a general act already repealed by another general act, is wholly nugatory : *Reed's App.*, 114 Pa. St. 452.

<sup>20</sup> *Felt v. Felt*, 19 Wis. 193 ; *State v. Goetze*, 22 Id. 63.

<sup>21</sup> See *Williams v. McDonal*, 4 Chand. (Wis.) 65, and ante, § 111, and cases there cited.

(a) *Per Best, J. J.*, in *Churchill v. Crease*, 5 Bing. 180. And see ex. gr. *Pilkington v. Cooke*, 16 M. & W. 615 ; *Taylor v. Oldham*, 4 Cl. D. 395, 46 L. J. 105. [Bish., *W. L.* § 156, and cases there cited.]

<sup>22</sup> *Exp. Smith*, 40 Cal. 419.

<sup>23</sup> *Ibid.*

clearly includes the matter in controversy, whilst the other is general and would, if standing alone, include it also ; and if, reading the general provision side by side with the particular one, the inclusion of that matter in the former would produce a conflict between it and the special provision,—it must be taken that the latter was designed as an exception to the general provision;<sup>24</sup> as, where an incorporation law contains provisions regulating the bringing of actions against corporations created under it, at variance with earlier provisions upon the subject of suits against corporations generally.<sup>25</sup> So, where an act, making the term of office of revenue commissioners four years, and on the same day upon which certain amendments to the act, not, however, changing that term, were passed, the charter of a city was amended so as to make the term of office of its revenue commissioners two years, it was held that this enactment constituted a special exception to the general law.<sup>26</sup> So the minute and particular provisions of one act prescribing the salary of the register of voters in New Orleans was held unaffected by a general power given by another act approved the same day to the common councils in relation to all city salaries.<sup>27</sup> As another instance of this construction may be cited the following case: A local act, of January 16, 1849, provided that the auditor of a certain county should receive \$700 per annum in full for his official services as such ; that he should make semi-annual returns to the county board of all fees and emoluments received by him ; and that the board should allow him \$350 out of the county treasury. A general act passed January 17, 1849, “to increase and extend the benefits of common schools,” required county auditors to perform certain duties before belonging to the school commissioner, and as compensation gave them one-half of one per centum on the amount of school funds on loan in their respective counties. It was held that the two acts were to be construed, as if constituting one act to the effect, that, for ser-

<sup>24</sup> Crane v. Reeder, 22 Mich. 322.

<sup>25</sup> Dewey v. Centr. Car, etc., Co., 42 Mich. 399. Comp. Casey v. Harned, 5 Iowa, 1.

<sup>26</sup> Branham v. Long, 78 Va. 352;

and see supra, § 215; State v. Trenton, 38 N. J. L. 64.

<sup>27</sup> St. Martin v. New Orleans, 14 La. An. 113.

vices relative to the school fund, county auditors should receive one-half of one per centum on the amount of school funds, etc., provided that the auditor of the particular county referred to in the act of January 16, should not be allowed such percentage in addition to his fixed salary of \$700.<sup>28</sup>] Even when the later, or later part of the enactment is in the negative, it is sometimes reconcilable with the earlier one by so treating it. If, for instance, an act in one section authorized a corporation to sell a particular piece of land, and in another prohibited it to sell "any land," the first section would be treated not as repealed by the sweeping terms of the other, but as an exception to it (a). [Thus, in an act giving a charter to a city, section 83 provided a specific and detailed remedy for the collection of assessments, and declared the provision applicable to the collection of those due and unpaid at the passage of the act; section 109, however, provided that "nothing in said act contained shall be construed to destroy, impair, or take away any right or remedy acquired or given by any act" repealed by this statute. It was held, nevertheless, that the provisions of section 83 applied to the collection of assessments due and unpaid at the time of the passage of the act, because it was a specific provision on the subject and would otherwise be nullified, and that section 109 applied only to preserve contract rights against the city.<sup>29</sup>] In this manner two acts passed in 1833 were construed as reconcilable. The 3 and 4 Will. 4, c. 27, s. 42, which provided that no action for rent, or for interest on money charged on land shall be brought after six years, and the 3 & 4 Will. 4, c. 42, passed three weeks later, which provided that no action for rent reserved by lease under seal, or for money secured by bond or other specialty, should be brought after twenty years, were construed as reconcilable, by holding that the later enactment was an exception out of

<sup>28</sup> *La Grange Co. v. Cutler*, 6 Ind. 354.

(a) *Per Romilly, M. R.*, in *De Winton v. Brecon*, 28 L. J. Ch. 600.

<sup>29</sup> *State v. Trenton*, 38 N. J. L. 64. This was, in effect, a restriction of the general language of one

part of an act, to a purpose disclosed by a comparison of other portions thereof: see ante, § 37; and the construction also flows from the application of the principle *Expressio unius est exclusio alterius*, in its proper significance: see post, §§ 397-399.

the former. And the effect of the conjoined enactments was that no more than six years' arrears of rent or interest were recoverable, except where they were secured by covenant or other specialty, in which case twenty years' arrears were recoverable (a). [Similarly, the provision in an earlier act that the omission of the holder of a certificate of purchase under a tax sale to give notice might extend the period of redemption beyond two years, was held unaffected by a subsequent statute limiting, in general, the period of redemption to two years.<sup>30</sup>]

§ 217. **Negative Statutes Affirmative Inter se.**—It may be observed, also, that two statutes expressed in negative terms may be affirmative inter se, and not contradictory, though negative as regards a third at which they are avowedly aimed. They may make two holes in the earlier act, which can stand side by side without merging into one (b). [So, a statute having provided that persons living within one mile of a toll-gate should pay only half toll,—a second, that the first should not apply to persons engaged in transporting goods for others,—a third, not mentioning the second, that the first should read “except persons residing in a city or incorporated village,”—it was held that the second act remained in force, the effect of the whole being that persons living within a mile of the gate, engaged in transporting for others, were liable to pay full toll, though not residing in any city or incorporated village.<sup>31</sup>] The 12 Anne, st. 2, c. 16, having made void all loans at more than five per cent., the 3 & 4 Will. 4, c. 98, enacted that “no” bill or note payable at three months or less should be void for usury; and the 2 & 3 Vict. c. 37, that “no” bill or note payable at twelve months or less should be void on that ground, but

(a) *Hunter v. Nockolds*, 1 Mc.-N. & Gord, 640, *Paget v. Foley*, 2 Bing. N. C. 679; *Sims v. Thomas*, 12 A. & E. 535; *Humfrey v. Gery*, 7 C. B. 567. See also *Cobham v. Dalton*, L. R. 10 Ch. 655; *Re Deere*, Id.; *Richens v. Wiggins*, 3 B. & S. 953, 32 L. J. 144. *Comp. Round v. Bell*, 30 Beav. 121. Rent is a specialty debt within the 32 & 33 Vict. c. 46, in the admin-

istration of assets, *Talbot v. Shrewsbury*, L. R. 16 Eq. 26, 42 L. J. 877; *Re Hastings*, 6 Ch. D. 610, 47 L. J. 137.

<sup>30</sup> *Gaston v. Merriam*, 33 Minn. 271.

(b) *Per Maule, J.*, in *Clack v. Salisbury*, 11 C. B. 695, 2 L. M. & P. 627, 631.

<sup>31</sup> *Canastota, etc., Co. v. Parkhill*, 50 Barb. (N. Y.) 601.

with the additional provision that the act was not to apply to loans on real security; and it was held that the last-mentioned act did not repeal the 3 & 4 Will. 4. The negative words, in which both were expressed, had reference to the Act of Anne; but *inter se*, they were affirmative statutes, and the proviso of the later one, therefore, did not affect the short loans dealt with by the Act of William IV. (a).

§ 218. **Statutes without Expressed or Implied Negative.**—Further, it is laid down generally, that when the later enactment is worded in affirmative terms only, without any negative expressed or implied, it does not repeal the earlier law (b). Thus, an act which authorized the Quarter Sessions to try a certain offence, would involve no inconsistency with an earlier one which enacted that the offence should be tried by the Queen's Bench or the Assizes; (c) [nor an act authorizing a proceeding to contest the validity of a will, by petition to the court of common pleas, any inconsistency with an earlier one providing for a proceeding by bill in chancery;<sup>32</sup> and in *neither* case, therefore, would the later repeal the prior law.<sup>33</sup>] So, an act which imposes a liability on certain persons to repair a road, would not be construed as impliedly exonerating the parish from its common law duty to do so (d). [Nor does an act empowering the court to order the children of indigent persons unable to work, to support them, relieve the poor district in which such paupers may be found from its duty to provide for them until they can be removed to the place of their last settlement.<sup>34</sup>] A local

(a) *Clack v. Sainsbury*, *ubi sup.*; *Nixon v. Phillips*, 7 Ex. 188, 21 L. J. 88; *Exp. Warrington*, 3 De G. M. & G. 159, 22 L. J., Bank. 53.

(b) *Co. Litt.* 115a, *Anon.*, *Lofft*, 465; *Muir v. Hore*, 47 L. J. M. C. 17. [See, also, *Williams v. Potter*, 2 Barb. (N. Y.) 316; *Bruse v. Schuyler*, 9 Ill. 221; *Mullen v. People*, 31 Id. 444; *Ament v. Humphrey*, 3 Gr. (Ia.) 255; *Planters' B'k v. State*, 14 Miss. 628; *White v. Johnson*, 23 Id. 68; *Street v. Com'th*, 6 Watts & S. (Pa.) 209; *Shinn v. Com'th*, 3 Grant (Pa.) 205; *Nixon v. Piffet*, 16 La. An. 379; *Atty-Gen. v. Brown*, 1 Wis. 513; *State v. Macon Co.*, 41 Mo.

453; *DePauw v. New Albany*, 23 Ind. 204; *Blain v. Bailey*, 25 Id. 165; *Brown v. Miller*, 4 J. J. Marsh. (Ky.) 474; *Elliot v. Lochname*, 1 Kan. 126; *McLaughlin v. Hoover*, 1 Oreg. 31; *Cate v. State*, 3 Sneed (Tenn.) 120.

(c) *Co. Litt.* 115a, 2 Inst. 200.

<sup>32</sup> *Raudebaugh v. Shelly*, 6 Ohio St. 307.

<sup>33</sup> See also, *ante*, § 151.

(d) *R. v. St. George's Hanover Square*, 3 Camp. 222; *R. v. Southampton*, 23 L. J. M. C. 201; *Gibson v. Preston*, L. R. 5 Q. B. 219.

<sup>34</sup> *Kelly v. Union Tp.*, 5 Watts & S. (Pa.) 636.



act, in directing that the chimneys of buildings should be built of such materials as the corporation approved, did not affect the provisions of the earlier general act (3 & 4 Vict. c. 85, s. 6), which required that chimneys should be built of stone or brick (a). A bye-law made under the 74th section of the Education Act, requiring children to attend school as long as it was open, (which was at least thirty hours in the week,) did not repeal the provision in the Workshops Regulation Act of 1869, which requires that children under thirteen employed in a workshop shall be sent to school for at least ten hours weekly (b). [Where an act exempted to the widow and children of a decedent dying testate or intestate the same property, which, by laws then in force, was exempted from execution, and a subsequent act repealed the law making an exemption of property of a certain value from execution, specified certain property which should be held exempt, and reserved the same articles for the benefit of the widow of any person dying intestate, it was held that this act did not repeal the one first mentioned, the exemption in favor of the widow, etc., of one dying intestate not being in conflict with a similar exemption in the case of one dying testate.<sup>35</sup> Nor was an act authorizing the transfer of certain money from the railroad and sinking fund to the county school fund, held repealed by a later one authorizing the transfer of surplus moneys by county commissioners from one fund to another.<sup>36</sup>] An act which provided that if a person suffered bodily injury from the neglect of a mill-owner to fence dangerous machinery, after notice to do so from a factory inspector, the mill-owner should be liable to a penalty, recoverable by the inspector, and applicable to the party injured, or otherwise, as the home secretary should determine, would not affect the common law right of the injured party to sue for damages for the injury (c). [And, in general, "an act which gives cumulative and not inconsistent remedies, and especially one which embraces cases

(a) *Hill v. Hall*, 1 Ex. D. 411.

(b) 30 & 31 Vict. c. 146, s. 24; *Berry v. Cherryholm*, 1 Ex. D. 457.

<sup>35</sup> *Graves v. Graves*, 10 B. Mon. (Ky.) 31.

<sup>36</sup> *State v. Storey Co.*, 17 Nev. 96.

(c) 7 Vict. c. 15; *Caswell v. Worth*, 5 E. & B. 894. See *Ambergate R. Co. v. Midland R. Co.*, 2 E. & B. 793.

not covered by the former legislation, does not repeal prior statutes upon the same subject-matter.””] A bond by a collector, with one surety, good under the ordinary law, would not be deemed invalid because the act which required it enacted that the collector should give good security by a joint and several bond with two sureties at least; (a) [nor a promissory note given to secure the rent of a public bridge by an act providing that a bond should be given for that purpose.”]

§ 219. The 30 & 31 Vict. c. 142, which authorizes a judge of the Superior Court in which an action is brought, to send the case for trial to a County Court, was construed as not impliedly repealing the earlier enactment of 11 Geo. 4, c. 70, which authorizes any judge of the Superior Courts to transact the chamber business of the other Courts as well as his own; but the later Act was read with the earlier, and the expression “Judge of the Court in which the action was brought,” was thus construed as equivalent to any judge of any of the Superior Courts of law (b). The 55 Geo. 3, c. 184, s. 52, which directed that all affidavits required by existing or future Acts for the verification of accounts should, unless when otherwise expressly provided, be made before the Commissioners of Stamps, was held unaffected by the 9 Geo. 4, c. 23, which empowered justices of the peace to administer the oath in similar cases. Although the later Act did “otherwise provide,” it did not make the provision inconsistent with the earlier Act (c).

<sup>87</sup> Sedgw., p. 100, note, cit. *Waldo v. Bell*, 13 La. An. 329; *Mitchell v. Duncan*, 7 Fla. 13; *Raudebaugh v. Shelly*, 6 Ohio St. 307; *State v. Berry*, 12 Iowa, 58; *Wilson v. Shorrick*, 21 Id. 332. See also *Gohen v. R. R. Co.*, 2 Woods, 346, that a statute giving a right of action for compensatory damages to the surviving husband, wife, child, or parents of any person whose life is lost by the negligence, etc., of any railroad company, etc., is not abrogated by a subsequent constitutional provision making every person, corporation, etc., that may commit a homicide

through any wilful act or omission, responsible in exemplary damages to the surviving husband, widow or heirs of the decedent. Compare to similar effect as to action of a constitutional provision upon a prior act in *pari materia*, *In re Cont. Election of Barber*, 86 Pa. St. 392.

(a) *Peppin v. Cooper*, 2 B. & A. 431. See *Austen v. Howard*, 7 Taunt. 28, 237.

<sup>88</sup> *Centr. B'k v. Kendrick*, Dudley (Ga.) 66.

(b) *Owens v. Woosman*, L. R. C. C. 95, 3 Q. B. 469.

(c) *R. v. Greenland*, R. L. 1.

Where one Bankruptcy Act empowered the Court to make the bankrupt an allowance, and a later one enacted that the creditors should determine whether any and what allowance should be made to him, it was held that the former power was still in force when the creditors did not exercise that given them by the latter Act (*a*). [So, two sections of an act defining the degrees of murder, the third providing that the degree of murder should be found by the jury, were held to apply to cases in which the accused pleaded guilty."]

§ 220. Where a power was given by a local Act to Commissioners to make drains through private lands, after giving twenty-eight days' public notice, with power to the persons interested to appeal; and the subsequently passed Nuisances Removal Act of 1855 gave the same power to the same Commissioners, without requiring notice, it was held that they were at liberty to act under either statute. The notice was not a right given to the parties interested, but a mere restriction; and there was no more inconsistency in the co-existence of the two powers, than in the co-existence of the ordinary covenants in a lease to repair simply, and to repair after a month's notice (*b*). [Where, indeed, an act takes away no right conferred by a former act, nor imposes any substantially new duty, but regulates, with additional requirements, a duty imposed by the former act, *e. g.*, adding to the duty imposed upon railroads to construct fences, that of constructing gates, along the line of the road, there is said to be no inconsistency between the two." Thus, where an act, passed in 1861, authorized the councils of a city to improve streets and levy the cost on owners of property thereon, but provided that such improvement should not be ordained except on the petition of a majority of the property owners on the street to be improved; and a later act, passed in 1864, gave councils power to ordain

(*a*) Exp. Ellerton, 33 L. J. Bank. 32.

<sup>39</sup> Green v. Com'th, 12 Allen, (Mass.) 155.

(*b*) Derby v. Bury Commissioners, L. R. 4 Ex. 223; comp., however, such cases as Cumberland v. Copeland, 1 H. & C. 194, inf.

<sup>40</sup> Stoats v. R. R. Co., 4 Abb.

App. Dec. (N. Y.) 287. Such a provision is said to be not a mere regulation respecting division fences between land owners, but a police regulation for the safety of the public, and entitled to an extended application: *Ib.*; Corwin v. R. R. Co., 13 N. Y. 42, 53.

improvements by a two-thirds vote, without such petition,—it was held that the act did not repeal the former, but the two statutes, standing together, had the effect of giving two modes by which streets could be improved: first, upon petition of a majority of the property owners on the street to be improved; and second, without such petition, by a two-thirds vote of councils.” But when a still later act, passed in 1868, declared that councils could improve whenever a majority of owners, etc., should petition, “and not otherwise,” except when the ordinance for the improvement should order the payment thereof from the city funds, this act was said to repeal that of 1864 upon the subject, “unless, perhaps, where the exception applied.”<sup>42</sup> It did not, however, repeal a provision of the act of 1861 that, if notice were given by publication, etc., of the improvement petitioned for, the question whether a majority of owners had petitioned should cease after the passage of the ordinance providing for the improvement, *i. e.*, making the same conclusive thereon; nor the provision of that act for the assessment of the cost on the owners.<sup>43</sup>]

§ 221. Where an Act imposed a duty of thirty-five shillings on the transfer of a mortgage, and a second provided that when the transfer was made by several deeds, only five shillings should be charged on all but the first, and a third Act repealed the first by imposing a stamp of sixpence per 100*l.*, it was held that the second Act was not impliedly repealed by the third (*a*). [So, an act imposed a penalty on the issuing of a marriage license to a minor; an amendment to the act legalized such issuing upon the affidavit of the minor and his personal appearance indicating full age, and the former provision was expressly repealed, saving, however, liabilities incurred by breach of it prior to the amendment; a later act provided, that, in all suits thereafter to be brought under the first act as amended, the consent of the parent or guardian of the minor should be a defense, and repealed all laws in conflict with its own pro-

<sup>42</sup> *Erie v. Bootz*, 72 Pa. St. 196.

<sup>43</sup> *Ibid.*, at p. 200.

<sup>44</sup> *Ibid.*

(*a*) *Foley v. Commissioners of Inland Revenue*, 3 Ex. 263.

visions: it was held that the saving clause in the amendment remained unrepealed." The Acts 43 Eliz. c. 6, 21 Jac. c. 16, and 22 and 23 Car. 2, c. 9, having provided that a plaintiff in an action for slander, who recovered less than forty shillings damages, was to be entitled only to as much costs as the damages amounted to; the 3 & 4 Vict. c. 24, after expressly repealing the first and third of those Acts, without mentioning the second, enacted that a plaintiff who, in such cases, recovered less damage than forty shillings, should not be entitled to any costs, unless the presiding judge certified that the slander was malicious; and it was held that this later enactment did not impliedly repeal the 21 Jac. c. 16, and that the effect of the judge's certificate was merely to remit the plaintiff to the rights which that statute gave him (a).

§ 222. **Acts merely Giving Direction and Application to Old Law.**—[It is also said that the rule, *Leges posteriores priores contrarias abrogant*, is inapplicable in the construction of a new law simply giving application and direction to the prior law; so that an act providing for the organization of counties into municipal townships, though declaring an earlier act upon the same subject, and largely re-enacted by the later one, repealed, was construed as a continuation thereof, and not as avoiding any proceedings begun thereunder.<sup>45</sup> But a later statute making a different provision from that contained in a former one, upon the same subject, should not be construed as an explanatory act, unless such a construction fairly appears to be intended, but, to the extent of the incompatibility of the two acts with each other, as an implied repeal of the earlier.<sup>47</sup>]

<sup>44</sup> *Roberts v. Pippen*, 75 Ala. 103; *Fulghum v. Roberts*, Id. 341.

(a) *Evans v. Rees*, 9 C. B. N. S. 391, 39 L. J. 16; acc. *Marshall v. Martin*, L. R. 5 Q. B. 239. See also *Davies v. Griffiths*, 4 M. & W. 377, and *Wrightup v. Greenacre*, 10 Q. B. 1.

<sup>45</sup> *State v. Vernon County Court*, 53 Mo. 128. See Matt. 5, 17.

<sup>46</sup> *Ibid.*; and comp., ante, § 113. See also *Smith v. People*, 47 N. Y. 330, where a repeal, absolute in its

terms, and referring to the title of an act as intended to be repealed, was limited, by construction, on the ground that the general scope of the later act was to reconstruct the political organization of the city of New York and not to repeal existing provisions as to criminal courts therein see ante, § 43, note.

<sup>47</sup> *People v. Van Nort*, 64 Barb. (N. Y.) 205.

§ 223. *Generalia Specialibus Non Derogant.*—It is but a particular application of the general presumption against an intention to alter the law beyond the immediate scope of the statute, to say that a general Act is to be construed as not repealing a particular one, that is, one directed towards a *special object* or a *special class* of objects (*a*). A general later [affirmative] law does not abrogate an earlier special one by mere implication (*b*). *Generalia specialibus non derogant* (*c*); the law does not allow the exposition to revoke or alter, by construction of general words, any particular statute, where the words [of the two acts, as compared with each other, are not so glaringly repugnant and irreconcilable as to indicate a legislative intent to repeal,<sup>48</sup>] but may have their proper operation without it (*d*). It is usually presumed to have only general cases in view, and not particular cases which have been already otherwise provided for by the special Act, or, what is the same thing, by a local custom (*e*). Having already given its attention to the particular subject, and provided for it, the Legislature is reasonably presumed not to intend to alter that special provision by a subsequent general enactment, unless that intention is manifested in ex-

(*a*) Lord Hatherley, 3 App. 950. [This is especially so where the two acts were passed at the same session: *Ottawa v. La Salle Co.*, 12 Ill. 339; *McFarlan v. State B'k*, 4 Ark. 410.]

(*b*) *Thorpe v. Adams*, L. R. 6 C. P. 125; *R. v. Champneys*, Id. 384. [*Seward v. The Vera Cruz*, L. R., 10 App. Cas. 68; *N. Y., etc., Ry. Co. v. Supervisors*, 67 How. Pr. (N. Y.) 5; *Hyde Park v. Oakwoods Cem'y Ass'n*, 119 Ill. 141; *State v. Mills*, 34 N. J. L. 177; *State v. Stevenson*, 44 Id. 371; *Brown v. Comm'rs*, 21 Pa. St. 37; *Dyer v. Covington*, 28 Id. 186; *Cumru Tp. v. Poor Dir's*, 112 Id. 264; *State v. Fitzgerald*, 17 Mo. App. 271; *State v. Smith*, 8 S. C. 127; *Luke v. State*, 5 Fla. 185; *Ellis v. Batts*, 26 Tex. 708; *Schwenke v. R. R. Co.*, 7 Col. 512, and cases infra. See also, *Bish., Wr. L.*, § 112 *b*, and cases there cited.]

(*c*) *Jenk. Cent.* 120.

<sup>48</sup> See *Gage v. Currier*, 4 Pick.

(Mass.) 399; *Covington v. East St. Louis*, 78 Ill. 548; *Conley v. Calhoun Co.*, 2 W. Va. 416; *Chesapeake, etc., Ry. Co. v. Hoard*, 16 Id. 270.

(*d*) *Lyn v. Wyn. Bridg.* 127; acc. *M. Smith, J., in Conserv. Thames v. Hall*, L. R. 3 C. P. 421, and *Bramwell, B. in Dodds v. Shepherd*, 1 Ex. D. 78.

(*e*) *Co. Litt.* 115a; *Herbert's Case*, 3 Rep. 13b, note U.; *Gregory's Case*, 6 Rep. 19b; *R. v. Pugh, Doug.* 188; *Hutchins v. Player*, Orl. Bridg. 272; *Plowd.* 36. [The existence of a special custom, such as is known and recognized by the law of England, is probably unknown in this country. But as there such a custom has all the effect of a local law, the decisions upon the effect of general statutes on such customs are instructive to the American as well as the English reader, and in principle, apposite to the subject in hand.]

plicit language (a), or there be something which shows that the attention of the Legislature had been turned to the special Act, and that the general one was intended to embrace the special cases within the previous one (b); or something in the nature of the general one making it unlikely that an exception was intended as regards the special Act. The general statute is read as silently excluding from its operation the cases which have been provided for by the special one; [for, as was said of the relation of a general act to a local one applying to a single county of the state, "it is against reason to suppose that the Legislature, in framing a general system for the state, intended to repeal a special act which the local circumstances of one county had made necessary."<sup>48</sup> The fact that the general act contains a clause repealing acts inconsistent with it does not diminish the force of this rule of construction.<sup>50</sup>]

§ 224. Thus, when a local Act, for completing the bridge across the Thames, exempted the owners of the adjoining ground, which was to be embanked at their expense, from all taxes and assessments whatsoever, it was held that later general Acts imposing taxes and rates in respect of lands and houses, did not repeal that exemption (c). [Conversely, where a special act declared certain public property liable to road taxes, it was intimated that a subsequent general statute declaring property of the kind to which it belonged exempt from all taxation, state and local, could not have the effect of repealing the special law.<sup>51</sup>] Where an Act took away the right of bringing an action respecting certain disputes, which was referred to the summary adjudication of justices; it was held that the subsequently established County Courts acquired no jurisdiction to try such cases,

(a) *Per* Wood, V. C., in *Fitzgerald v. Champneys*, 2 Jo. & H. 54, 30 L. J. Ch. 782.

(b) *Per* Lord Hatherley in *Garnett v. Bradley*, 48 L. J. Q. B. 189; and see *per* Cur. in *R. v. Poor Law Com.*, 6 A. & E. 48.

<sup>48</sup> *Brown v. Comm'rs*, 21 Pa. St. 37, *per* Gibson, C. J.; *Seifried v. Com'th*, 101 Id. 200; *Kilgore v. Com'th*, 94 Id. 495; *Re Bounty*

*Accounts*, 70 Id. 92; *Malloy v. Comm'th*, 115 Id. 25.

<sup>50</sup> *State v. Townsh. Committee*, (N. J.) 3 Centr. Rep. 351.

(c) *Williams v. Pritchard*, and *Eddington v. Borman*, 4 T. R. 2 and 4. See *Duncan v. Sc. N. E. R. Co.*, 2 Sc. App. 20.

<sup>51</sup> *Cumru Tp. v. Poor Dir's*, 112 Pa. St. 264, 271.

under the general authority to try "all pleas" (a). [Nor was an act exempting a certain class of property from municipal taxation repealed by a subsequent act giving municipalities power to tax "all property" within their limits, there being no expressed intention to take away the exemption formerly enacted."]

The provision of the Judicature Act of 1875, that, except where it is otherwise provided by the Act or the rules annexed to it, the judgment of the Court shall be obtained by motion, was held not to affect the County Courts Act of 1856, which, after authorizing the Superior Courts to send certain cases to the County Courts for trial, had directed that the judgment might be signed in accordance with the result as certified by the registrar (b). [An act punishing killing while engaged in the commission of an unlawful act, would not repeal an act punishing killing by administering poisonous drugs to procure an abortion." An act prohibiting any public officer from appropriating funds collected in one year to demands that arose in a previous one, would, upon the same principle, not operate as a repeal of an act directing the application of certain taxes to the payment of past due claims, but would only prevent executive officers from employing, in their own discretion, the public moneys for such purpose."]

§ 225. The General Turnpike Act, 3 Geo. 4, c. 126, which empowered turnpike trustees to let the tolls, and provided that all contracts for letting them should be valid, though not by deed, "any Acts of Parliament or law to the contrary thereof notwithstanding," was held unaffected by the 8 & 9 Vict. c. 106, which in the most general terms

(a) Exp. Payne, 5 D. & L. 679.

<sup>59</sup> Blain v. Bailey, 25 Ind. 165. And see Rounds v. Waymart, 81 Pa. St. 395, where it was held that the Pa. general tax act of 1873 did not repeal the act of 1864, exempting soldiers' property, by conferring authority to tax "all real estate."

(b) See note c, p. 299.

<sup>58</sup> Robbins v. State, 8 Ohio St. 131. And see also, as to similar effect of a statute relating to crimes

generally upon one relating to crimes by a particular class of persons, *e. g.*, slaves: Luke v. State, 5 Fla. 185. (But comp. Ely v. Thompson, 3 A. K. Marsh (Ky.) 70) and of a general act for the punishment of grand larceny and other offences named upon one punishing horse-stealing and larceny of certain other animals: Magruder v. State, 40 Ala. 347.

<sup>54</sup> State v. Smith, 8 S. C. 127



declares that "a lease, required by law to be in writing, of any tenements and hereditaments, shall be void unless made by deed." It was not to be supposed that the Legislature intended by the later Act to interfere with the policy of the earlier one, which was emphatically that a deed should not be required for turnpike tolls (*a*), though necessary by the general law of the land (*b*). [Upon the same principle, an act giving a general authority to commissioners to lay out such streets as they may deem necessary within the limits of a borough will not authorize them to run a street through a graveyard, the laying out of streets through such being prohibited by a prior general law;" and an act requiring appellants from decrees of the Orphans' Court to give security, by recognizance with sufficient sureties, in the Orphans' Court, conditioned to prosecute the appeal with effect, was held unaffected by a subsequent act providing, that, upon all appeals and writs of certiorari or error, a recognizance with sufficient sureties should be entered in the Supreme Court conditioned for the payment of costs and return of the record." A general law enacting that a judicial sale shall divest all liens save a first mortgage upon the property sold, does not repeal a special law establishing a contrary system and practice in a particular locality;" nor a general law requiring collectors of taxes to pay over the taxes on or before December 22 of every year, a special one requiring to the treasurer of a particular city to receive the taxes and pay them over on or before October 22 of each year."<sup>55</sup> An act prohibiting the "catching of sturgeon in

(*a*) *Shepherd v. Hodsman*, 18 Q. B. 316, 21 L. J. Q. B. 263.

(*b*) *R. v. Salisbury*, 8 A. & E. 716. [For an instance in which the phrase "any law, usage or custom to the contrary notwithstanding," occurring in a later act, was held not to indicate an intention to repeal an earlier one, see *Mayor of Philad'a v. Davis*, 6 Watts & S. (Pa.) 269, 278.]

<sup>55</sup> *Egypt Str.*, 2 Grant (Pa.) 455.

<sup>56</sup> *Com'th v. Judges*, 102 Pa. St. 228. "The discretionary power of the Orphans' Court as to the extent of the security which it may require, on an appeal from one of its

decrees, is expressly affirmed in *Com'th v. Judges*, 10 Pa. St. 37. Leaving this power with the judges of that court evinces wise legislative forethought. They know better than any other tribunal what security is necessary to protect the vast and complicated interests which they are required to guard;" *Ibid.*, at p. 230. The acts under construction were those of 29 Mar. 1832, and 8 June, 1881.

<sup>57</sup> *Rhein Bldg. Ass'n v. Lea*, 100 Pa. St. 213.

<sup>58</sup> *State v. Stevenson*, 44 N. J. L. 371.

any of the waters of " the Commonwealth of Pennsylvania, did not repeal a prior act permitting the catching of sturgeon in the waters of Lake Erie by means of pond nets;" and a general act to protect salmon was held inapplicable to the Columbia River, as to which, at the time of the passage of the general act, there was a special one in force."

§ 226. **Merely Seeming Repugnancy between General and Special Acts.**—[Sometimes, as in the case of general statutes upon the same subject<sup>61</sup> the inconsistency between the general and the special act is merely a seeming, and not a substantial one.<sup>62</sup> So, where an act provided that the stock of a certain railroad company, whose railway was only partly in the state of Pennsylvania, should be subject to taxation to an amount equal to the cost of constructing that part of the road which was in Pennsylvania; and a later general act declared that every railroad company doing business in Pennsylvania should be subject to a certain tax upon its capital stock, the later act clearly could not operate as a repeal of the former. The function of the special act was to fix the amount of the capital stock of this particular corporation to be assessed; that of the latter, to fix the rate of taxation. There was, therefore, no real repugnancy between the acts; " no difficulty in the way of both having effect."<sup>63</sup> So, again, a general statute regulating the affairs and powers of municipal corporations, authorizing them to alter the channels of water courses, etc., within the corporate limits, and the like, and providing for proceedings in one court to assess damages therefor, and directing the payment of these by the city, would obviously not repeal a prior local act authorizing a city to straighten the course of a creek within its limits, and within those of a township beyond

<sup>59</sup> Dunlap v. Com'th, 108 Pa. St. 607.

<sup>60</sup> State v. Sturgess, 10 Oreg. 58.

<sup>61</sup> See ante, §§ 211, 213.

<sup>62</sup> An act allowing the prevailing party in certain actions tried in San Francisco to include in his judgment five per cent. on the amount recovered, was held unrepealed by provisions of the code

relating only to *costs*, the code repealing only in "cases provided for" by it, and the percentage in question, therefore, if "*costs*," being unrepealed because unprovided for (see § 203), and, of course, unrepealed if not "*costs*:" Whitaker v. Haynes, 49 Cal. 596.

<sup>63</sup> Com'th v. Erie Ry. Co., 98 Pa. St. 137.

its limits, providing for the ascertainment of damages in another court, and requiring their payment by the county in which the city was located.<sup>64</sup> The statutes were not co-extensive, and hence there could be no pervading inconsistency between them.<sup>65</sup>

§ 227. **Personal and Local Acts.**—[A general statute will not, ordinarily, repeal by implication particular statutes made for the relief or benefit of individuals,<sup>66</sup> and] personal Acts and local customs affecting only certain persons in their rights, privileges, or property, offer other illustrations of this rule, that special enactments are unaffected by the general words of a more general enactment, [unless a modification or repeal of the same, in whole or in part, is provided by express words or arises from the necessary meaning and effect of the language and provisions of the general law.<sup>67</sup>] Thus, the Act abolishing fines and recoveries which, in the most comprehensive terms, authorizes “every tenant in tail” to bar his entail in a certain manner, does not apply to the tenant in tail of property entailed by special Act of Parliament, such as the Shrewsbury, Marlborough, Wellington, and other special Parliamentary entails (*a*). And in the same way, the 1 & 2 Vict. c. 110, which in general terms enacted that a judgment of a Superior Court shall operate as a charge on the lands of the debtor from the time of its registration in the Common Pleas was held not to repeal by implication the Middlesex Registration Act, which had enacted that no judgment should bind lands in Middlesex, but from the time of its registration in the register office for Middlesex (*b*). An Act which authorized “any person” to sell beer, who obtained a license for the purpose, would not be construed as repealing the custom or local law of a borough which disqualified all persons who were not burgesses from selling

<sup>64</sup> Harrisburg v. Sheck, 104 Pa. St. 53.

<sup>65</sup> Comp. Frederick v. Goshorn, 30 Md. 436, post, § 230.

<sup>66</sup> Beridon v. Barbin, 13 La. An. 458.

<sup>67</sup> State v. Mills, 34 N. J. L. 177.

(*a*) *Per* Wood, V. C., in Fitzgerald v. Champneys, ubi sup. See

Abergavenny v. Brace, L. R., 7 Ex. 145; and comp. *Re* Cuckfield Board, 19 Beav. 153.

(*b*) 1 & 2 Vict. c. 110, ss. 13 & 19; 7 Anne, c. 20, s. 18; Westbrook v. Blythe, 3 E. & B. 737, 23 L. J. 386. See also Dale's Case, 6 Q. B. D. 376, 7 App. 240; Fritz v. Hobson, 14 Ch D 542 49 L. J. 321.

beer (a). [So, where a special act provided that tavern licenses should, in a certain county, be issued by the treasurer thereof, appointed certain fees therefor, and directed that three-fourths of such fees should be for the use of the county, and one-fourth should be paid to the state; and a later general act declared, that, when not otherwise provided by special law, licenses should be granted by the Courts of Quarter Sessions, fixed the fees differently from the special act referred to, and made the whole payable to the state, repealing, however, specifically, no act except one known as the 'Local Option Law,'—it was held that the special act was not in any respect repealed by the general one, although the exception above stated seemed to refer only to the agency through which licenses were to be granted, and not to the application of the fees received therefore.<sup>68</sup> Similarly, a statute imposing a fine for the sale of spirituous liquors in a certain town was held unaffected by a subsequent general act upon the subject;<sup>69</sup> and in the same way, the general repealing clause of a revenue act was held not to affect a prior special law regulating the licensing of intelligence offices in a particular county.<sup>70</sup>] An act which required all persons to serve as jurors of the county, in general terms, would not be construed as extending to a hundred, when those who served as jurors in the hundred were by custom exempted from service in the county (b). So, the 50 Geo. 3, c. 41, which empowered licensed hawkers to set up in any trade in the place where they resided, was held not to give them that privilege in a borough where, by custom or bye-law, strangers were not allowed to trade (c). [So, where a local act authorized the appointment of auditors by the Court of Quarter Sessions to audit the bounty accounts of school directors of wards, etc., in a certain county, and a subsequent general

(a) *Leicester v. Burgess*, 5 B. & Ad. 246; 11 Geo. 4, c. 64, s. 29 repealed by 25 & 26 Vict. c. 23; comp. *Huxham v. Wheeler*, 3 H. & C. 75, 33 L. J. 153; *Hutchins v. Player*, Bridg. 272.

<sup>68</sup> *Kilgore v. Com'th*, 94 Pa. St. 495. See ante, § 203.

<sup>69</sup> *McRae v. Wessell*, 6 Ired. L. (N. C.) 153.

<sup>70</sup> *Hall v. Supervisors*, 20 Cal. 591.

(b) *R. v. Pugh*, Doug. 188; *R. v. St. James' Westminster*, 5 A. & E. 391; *R. v. Johnson*, 6 Cl. & F. 41.

(c) *Simon v. Moss*, 2 B. & Ad. 543; *Llandaff Market Co. v. Lyndon*, 8 C. B. N. S. 515, 30 L. J. 105.

act, without repealing clause or reference to said act, required the auditing of such accounts by the proper board of auditors of the ward, etc., it was held that the latter act did not repeal the former."<sup>11</sup>] So an act which authorized the lord of a manor and his heirs to break up the pavement of the streets of a town, for the purpose of laying down water-pipes to convey water to and through the town, from his estate, would not be affected by a subsequent Act which vested the same streets and pavements in a public body, and empowered it to sue any person who broke them up (a).

§ 228. **Charters, etc. Municipal Corporations.**—[In accordance with this principle, general acts are ordinarily held not to repeal the provisions of charters granted to municipal and other corporations, or special acts passed for their benefit, though conflicting with the general provisions."<sup>12</sup> So, where the charter of a municipality contained a proviso prohibiting it from pledging its credit for over \$10,000 without a vote, etc., a subsequent act empowering the city to build a bridge and pledge its credit therefor was held subject to the condition and limitation of the proviso."<sup>13</sup> And where the charter of a village gave to its authorities the exclusive right to grant licenses for selling liquors in the village, the license fee not to be less than that fixed by the laws of the state, and directed that the village treasurer should annually pay to the county treasurer the sum of \$10 for every license granted under the charter, beyond which amount no license money was required to be paid by the village to the county treasurer; the re-enactment, in a revision of the laws of the state, of an act, in force when the charter was granted, requiring villages generally to pay to the county all moneys derived from such licenses, was held not to repeal the provision of the charter referred to, although the revision

<sup>11</sup> *Re Bounty Accounts*, 70 Pa. St. 92. This decision was aided by the consideration, that, as there were no auditors for the ward in question, a repeal of the local act would, in its case, have involved a failure of justice, *i. e.*, no audit at all: *Ib.* p. 97.

(a) *Goldson v. Buck*, 15 East, 372.

<sup>12</sup> *Wood v. Election Comm'rs*, 58 Cal. 561. Comp. ante, § 226; *Harrisburg v. Sheck*, 104 Pa. St. 53. Comp. post, § 230.

<sup>13</sup> *Cumberland v. Magruder*, 34 Md. 381. Comp. *Knox Co. v. McComb*, 19 Ohio St. 320, post, § 230; and *Dutton v. Aurora*, 114 Ill. 138, *ibid.*, note 91.

repealed all acts and parts of acts the subjects of which were revised and re-enacted, or which were repugnant to its provisions."<sup>74</sup> So, again, a special statute authorizing a town to subscribe in aid of a railroad and raise money by taxation to pay the interest on bonds issued for that purpose, has been held to remain unaffected by a general act limiting the rate of municipal taxation to pay interest upon municipal debts.<sup>75</sup> Upon this principle, a general act relating to "any municipal corporation" was held confined, in its operation, to those incorporated under, or adopting, the act, and not to extend to those having special charters inconsistent with the act.<sup>76</sup> And similar, it seems, is the construction of a general act declaring itself applicable to "every town in the state;"<sup>77</sup> and equally where the later act, whilst not embracing the whole territory of the states, is yet more general than the special one varying from its provisions; *e. g.*, a special mechanics' lien law, for the city of New York, was not held repealed by a subsequent law upon the same subject applying to the cities of the state.<sup>78</sup> It follows, as a matter of course, that, where a general law relating to the municipal corporations contains no provision expressly applying, *e. g.*, to the levy and collection of taxes, etc., by cities incorporated under a previous special statute, the provisions of the latter on the subject remain in force.<sup>79</sup>

§ 229. **Charters, etc. Corporations Other than Municipal.**—[The same principle applies in the construction of general acts as affecting charters, and special acts passed for the benefit of

<sup>74</sup> *Wolworth Co. v. Whitewater*, 17 Wis. 193. It was said that this repeal must be construed as referring to general statutes, and not as abrogating all provisions of municipal charters previously enacted, which might conflict with the general statutes contained in the revision: *Ib.*; *Janesville v. Markoe*, 18 Id. 350. And see, for a similar construction as to the general provision of the Political Code of California, and of the Constitution of 1879, upon the provision of the act of 2 April, 1866, as amended by that of 1872, fixing the time for holding municipal elections in San

Francisco: *Wood v. Election Comm'rs*, 58 Cal. 561.

<sup>75</sup> *Fosdick v. Perrysburg*, 14 Ohio St. 472. Comp. post, § 230.

<sup>76</sup> *Burke v. Jeffries*, 20 Iowa, 145.

<sup>77</sup> *People v. West Chester*, 40 Hun (N. Y.) 353; *i. e.*, it would not necessarily, and simply on account of such a provision, repeal special legislation on the subject in behalf of a particular town, but would apply to every town having no local law thereon: *Ib.*

<sup>78</sup> *McKenna v. Edmundstone*, 10 Daly, (N. Y.) 410; 91 N. Y. 231.

<sup>79</sup> *Burke v. Jeffries*, 20 Iowa, 145.

corporations other than municipal. Thus,] where a railway company had authority, under a special Act, to take certain lands in the metropolis for executing their works on them, it was held that its powers were unaffected by the Metropolis Local Management Act, 18 & 19 Vict. c. 120, which was passed shortly afterwards, giving the same powers to a public body (a). [So, it was held that a method for the condemnation of land, to be taken for a railroad company, prescribed in the act incorporating the same, was not changed by a general incorporation act containing different provisions on the subject.<sup>80</sup> And, where the act in incorporating a turnpike road company required that its rate of tolls be written on sign boards in "large or capital letters," and a general act passed subsequently prescribed that the rates of tolls on turnpike roads be written in capital letters, it was held that, as to the company referred to, the private act must govern.<sup>81</sup> So a provision in a bank charter making its notes receivable by the state in payment of taxes, etc., was held unrepealed by a statute which made other current bank-notes also receivable for that purpose.<sup>82</sup> Nor did an act making state taxes payable in specie "or the notes of specie paying banks," repeal by implication the charter provision of the state bank which made its bills or notes, payable in coin, receivable in payment of taxes and other dues to the state.<sup>83</sup> Again, a special statute giving a bank a summary remedy for collection was held unaffected by a subsequent general law, in the absence of an intention clearly manifest on the face of the latter to repeal it;<sup>84</sup> and it is said, that, in default of such a manifest intent, no general law, subsequent to the enactment of a special provision for a corporation, can be construed to add other conditions to those imposed by the special law, thus modifying the latter by a cumulation of conditions.<sup>85</sup>]

(a) London and Blackwall R. Co. v. Limehouse Board, 3 Kay & Johns. 123, 26 L. J. Ch. 164; Comp. Daw v. Metrop. Board, 12 C. B. N. S. 161.

<sup>80</sup> Cascades R. R. Co. v. Sohns, 1 Wash. 557.

<sup>81</sup> Nichols v. Bertram, 3 Pick. (Mass.) 842.

<sup>82</sup> Furman v. Nickol, 8 Wall. 44.

<sup>83</sup> South Carolina v. Stoll, 17 Wall. 435.

<sup>84</sup> Pearce v. Bank, 33 Ala. 693.

<sup>85</sup> Mobile, etc., R. R. Co. v. State, 29 Ala. 573.

§ 230. **When General Act Repeals Special.**—In all these cases, the general Act seemed intended to apply to general cases only; and there was nothing to rebut that presumption. But if there be in the Act, or in its history, something showing that the attention of the Legislature had been turned to the earlier special Act, and that it intended to embrace the special cases within the general Act,—[and such an intent may be inferred from the fact that the provisions of the two acts are so glaringly repugnant to, and radically irreconcilable with, each other as to render it impossible for both to stand<sup>86</sup>—something in the nature of either Act, to render it unlikely that any exception was intended in favor of the special Act, the maxim under consideration ceases to be applicable; [although, even where the statute shows that the Legislature had in mind the existence of special acts, its provisions will not be construed to repeal them, if such an effect can be avoided, where there is no indication of an intention that there was to be a repeal.<sup>87</sup>] The Prescription Act, 2 & 3 Will. 4, c. 71, in giving an indefeasible right to light after an enjoyment of twenty years, “notwithstanding any local custom,” plainly abolished the custom of London which authorized the owner of an ancient house to build a new one on its old foundations to any height, though thereby obscuring the ancient lights of his neighbour (*a*). Though the sheriffs of the Counties Palatine of Lancaster and Durham were expressly forbidden by the 7 & 8 Geo. 4, c. 71, to arrest on mesne process issuing from the Courts of Westminster, for less than 50*l.*, this enactment was held repealed by the 1 & 2 Vict. c. 110, which after abolishing generally all arrests for debt, gave a judge power, under certain circumstances, to order such an arrest in every action for any sum for 20*l.* or upwards (*b*). [The provisions of a special statute incorporating a company and conferring special powers upon it may be modified or repealed by a

<sup>86</sup> See *Gage v. Currier*, 4 Pick. (Mass.) 399; *Covington v. East St. Louis*, 78 Ill. 548; *State v. Mills*, 34 N. J. L. 177; *Willing v. Bozman*, 52 Md. 44; *McVey v. McVey*, 51 Mo. 406; *Conley v. Calhoun Co.*, 2 W. Va. 416; *Chesapeake, etc., Ry. Co. v. Hoard*, 16 Id. 270.

<sup>87</sup> See *Kilgore v. Com'th*, 94 Pa. St. 495, ante, § 227.

(*a*) *Salter's Co. v. Jay*, 8 Q. B. 109; *R. v. Mayor of London*, 13 Q. B. 1; *Merchant Taylors v. Truscott*, 11 Ex. 855, 25 L. J. 173.

(*b*) *Brown v. McMillan*, 7 M. & W. 196.



general statute inconsistent with them, though not mentioning or referring to the special act.<sup>88</sup> Thus] the Mortmain Act was held to extend to a corporate body which had been empowered by an earlier Act to take land by devise and without license, in mortmain (*a*). [A general act "directing the mode of attaching on mesne process, and selling by execution, shares of debtors in incorporated companies," was held to repeal a different provision for the same purpose in an earlier act incorporating a turnpike company.<sup>89</sup> Similarly, the provisions of municipal charters or special acts passed for the benefit of municipalities may be affected by general laws. Thus, where a municipal charter specified certain trades to be licensed, and a subsequently passed general law specified a number of trades to be licensed, some of those designated in the charter being contained in this enumeration, whilst others were omitted therefrom, it was held that these were no longer subject to license.<sup>90</sup> So, where the Legislature had, by special acts, given some municipalities authority to subscribe in aid of railroads, without, however, giving them the right to sell the stock thus subscribed for, and others the same authority, with power to sell under certain restrictions, a statute subsequently passed giving general power to "any" municipality that had subscribed in aid of any railroad to sell their stock, without prescribing any restrictions upon the exercise of this power, it was held that the latter act repealed, by implication, the limitations upon the power of sale given to some municipalities and substituted, in all cases, the full power conferred by the last act.<sup>91</sup> Similarly, a special act relat-

<sup>88</sup> *Water Comm'rs v. Conkling*, 113 Ill. 340.

(*a*) *Lucraft v. Pridham*, 6 Ch. D. 205, 47 L. J. 744. See also *Morrison v. Genl. Steam Navig. Co.*, 22 L. J. Ex. 233, and see also *per* Jessel, M. R., in *Mersey Docks v. Lucas*, 51 L. J. Q. B. 116; *Gardner v. Whitford*, 4 C. B. N. S. 665.

<sup>89</sup> *Howe v. Starkweather*, 17 Mass. 240.

<sup>90</sup> *Cairo v. Bross*, 9 Ill. App. 406.

<sup>91</sup> *Knox Co. v. McComb*, 19 Ohio St. 320, 341. The decision is based (pp. 343-346) upon the obvious ground that the provisions of the

general act could not, in reason, be confined to such few as had no power of sale by special statutes, to the exclusion of those that had a limited power by such statutes, thus conferring an unlimited power upon those to whom all power had before been wholly denied, and leaving only a restricted power to the others. And it was also said: "The circumstances which evidently induced this general grant of unqualified powers . . . justify the belief that the intention of the Legislature was no less general than the terms employed would

ing to the opening and widening of a certain creek in a certain city was held to be entirely abrogated by an act adopting a code as a substitute for, and in view of, all general land and local laws then existing, although the latter act contained provision to the effect that "no rights, property, or privilege held under a charter or grant from this state shall be in any manner impaired or affected by the adoption of this code."<sup>92</sup>]

§ 231. **Effect of General Act Intended to Furnish Exclusive Rule.**—The general Lands Clauses Act of 1845, which authorizes the compulsory taking of lands for works of public utility, such as railways, and gives corresponding powers to tenants in tail or for life, to convey the lands so required, would apply to tenants in tail under special parliamentary entails, such as the Abergavenny entail (*a*). The County Courts acquired jurisdiction, under their general authority to hear "all pleas" where the debt or damage did not exceed 20*l.*, to enforce the payment of a rate imposed under a local Act passed before those Courts were established, and which had made such rates recoverable only by action in the Superior Courts (*b*). A local Act which provided that the prisoners of the borough to which it applied, and which had a separate Quarter Sessions, should be maintained in the county jail on certain specified terms, was held to be superseded by the General Act, 5 & 6 Vict. c. 95, which enacted that every borough, which had Quarter Sessions, should, when its prisoners were sent to the county jail, pay the county the expenses, including those of repairs and improvements (*c*).

[An intention to supersede local and special acts may, indeed, as is apparent from the illustrations afforded by this

seem clearly to indicate." See also *Dutton v. Aurora*, 114 Ill. 138, where a general act authorizing all cities to construct water-works without limit as to cost, and to borrow money for the purpose, was held to abrogate the provision of the charter of a particular city limiting its power to borrow money. *Comp. Fosdick v. Perrysburg*, 14 Id. 472, and *Cumberland*

*v. Magruder*, 34 Md. 381, ante, § 228.

<sup>92</sup> *Frederick v. Goshorn*, 30 Md. 486. *Comp. Harrisburg v. Sheck*, 104 Pa. St. 53; ante, § 226.

(*a*) *Re Cuckfield Board*, 19 Beav. 153, 24 L. J. Ch. 585.

(*b*) *Stewart v. Jones*, 1 E. & B. 22, 22 L. J. 1.

(*c*) *Bramston v. Colchester*, 6 E. & B. 246, 25 L. J. 73.

and the preceding sections, be gathered from the design of an act to regulate, by one general system or provision, the entire subject-matter thereof, and to substitute for a number of detached and varying enactments, one universal and uniform rule applicable throughout the state." Accordingly, it has been held that statutes fixing the terms of officers in certain counties, are to be deemed repealed, by implication, by a general statute fixing the terms of office of that class of officers throughout the state." And this seems to have been the principle upon which it was held, in Pennsylvania, that the act of 1855, imposing a fine of \$50, prescribing the mode of proceeding for its enforcement by an action of debt, and authorizing a further punishment by indictment, fine and imprisonment, was held to repeal a local act of 1851, imposing the same fine recoverable summarily.<sup>93</sup>]

§ 232. **General Act in Terms Applying to Subject of Special Act.**—Where a City gas company had been precluded by its private Act from charging more than four shillings for every thousand feet of gas of a certain quality, and the Metropolis Gas Act of 1860 required the City gas companies to supply a better and more expensive gas at the rate prescribed by it, which might amount to five shillings per thousand feet; it was held that the later provision impliedly repealed the earlier prohibition. Here, however, the general Act avowedly applied to the company; and it would have been unreasonable that the better gas which it required should be supplied at the price mentioned in the special Act, merely because the latter had not been repealed in express terms (*a.*)

<sup>93</sup> See *Gorham v. Luckett*, 6 B. Mon. (Ky.) 146. As to this effect of a Code, see *Frederick v. Goshorn*, 30 Md. 436.

<sup>94</sup> *State v. Pearey*, 44 Mo. 159. See *Pease v. Whitney*, 5 Mass. 379; *People v. Miner*, 47 Ill. 33.

<sup>95</sup> *Nusser v. Com'th*, 25 Pa. St. 126; (this construction was, however, aided by the fact that the local act authorized a summary conviction, without right of appeal or trial by jury: see *Ibid.*, at p. 127); and see also *Keller v. Com'th*, 71 Pa. St. 413, where a

general desertion act was held to repeal one local to several counties, and *Willing v. Bozman*, 52 Md. 44, where it was held that Md. Acts 1874, ch. 181, relating to oysters, being inconsistent with, and repugnant to, Acts 1872, ch. 241, "an act to protect oysters within the waters of Wicomico Co." repealed the same. Comp. ante, § 225.

(*a*) *Great Central Gas Co. v. Clarke*, 13 C. B. N. S. 838, 32 L. J. 41. See also *Parry v. Croydon Gas Co.*, 15 C. B. N. S. 568. The

§ 233. **Special Act Incorporating Provisions of General Act.**—

Where a general Act is incorporated into a special one, the provisions of the latter would prevail over any of the former with which they were inconsistent (*a*). It may be added, also, that when an Act on one subject, such as highways, incorporates some of the provisions comprised in another relating to a different subject, such as poor rates, it does not thereby incorporate the modifications of those provisions which are subsequently made in the latter Act (*b*). [In other words, the adoption in a local law, of specific regulations in a general law, is not necessarily, indeed, not unless a contrary intent be clear, an adoption of subsequent changes therein.<sup>99</sup> Hence, where a provision in an amendment to a municipal charter is but a re-enactment of a provision in a former charter which refers to the general statutes, such amendment of the charter will not be deemed to refer to amendments made to the general statutes after the enactment of the original charter.<sup>97</sup> And where an act passed in 1871 required the Court of Quarter Sessions of the County of Erie to appoint a board of license, "with the same authority to grant licenses to taverns, etc., in the City of Erie, as the Quarter Sessions by law now has," the provisions of an act passed in 1856 to be complied with before granting the licenses, it was held that the authority of the board was to be ascertained by the law as to the Quarter Sessions at the passage of the act.<sup>98</sup> Nor does the grant of powers by a statute, *e. g.*, incorporating a town, by a refer-

Metropolitan Police Act, 2 & 3 Vict. c. 71, s. 47, which provided that penalties under existing and future Acts, which should be adjudged by police magistrates, should be paid to the receiver of the police district, and the subsequent Act, 17 & 18 Vict. c. 38 (against gaming houses), which enacted that the penalties which it inflicted should be recoverable before two justices (or before a police magistrate, since he has the same jurisdiction as two justices), and should be paid to the overseers of the poor of the parish in which the offence was committed, were construed so as to be consistent with each other, by limiting the

application of the penalties under the later Act, to cases where they were imposed by justices, and applying them in conformity with the earlier statute, where they were adjudged by a police magistrate: *Wray v. Ellis*, 1 E. & E. 276, 28 L. J. Q. B. 45; and see *Receiver of Police District v. Bell*, L. R. 7 Q. B. 433.

(*a*) *Atty.-Genl. v. G. E. R. Co.*, L. R. 7 Ch. 475. [Comp. ante, § 101.]

(*b*) *Bird v. Adcock*, 47 L. J. M. C. 123. [See post, § 492.]

<sup>99</sup> *Darmstaetter v. Moloney*, 45 Mich. 621.

<sup>97</sup> *Re Main Str.*, 98 N. Y. 454.

<sup>98</sup> *Schlaudecker v. Marshall*, 72 Pa. St. 200.

ence to the powers granted by another statute of similar purpose, include the additional powers granted by an amendment to the latter enactment, though passed before the statute making the reference."<sup>99</sup>]

§ 234. **Implied Repeal between Special Acts.**—It has been said to be a rule that one private Act of Parliament cannot repeal another except by express enactment (*a*); but necessary implication must, no doubt, be considered as involved in this expression (*b*), if the intention of the Legislature be so manifested. If the later of the two Acts be inconsistent with the continued existence of the earlier one, the latter must inevitably be abrogated (*c*). [So, the tenth section of an act passed in 1836, incorporating a navigation company, the section permitting the collection of tolls only after completion of twenty miles of the work, was held repealed by the fifth section of an act passed in 1839, relating to the same company, the latter section supplying the former by permitting tolls to be collected for so much of the work as has been completed.<sup>100</sup> Similarly, where a river navigation company, under its charter, had provided a special remedy for persons injured by its works, etc., and a subsequent act of the Legislature in relation to the company declared it subject to the liabilities, etc., pertaining to such corporations generally, it was held, that, thereafter, the general law afforded the remedy for one injured, *e. g.*, by the raising of a dam.<sup>101</sup> And in a late case it was held, that, where all the essential provisions of a special act were supplied by a subsequent special act, and the provisions of the later act were incompatible with the continued existence of those of the earlier one, the latter must be held repealed by implication by, although there be no repealing clause in, the more recent statute.<sup>102</sup>

<sup>99</sup> *Tatum v. Tamaroa*, 9 Biss. 475. See further, post, § 490.

(*a*) *Per Turner, L. J.*, in *Birkenhead Docks v. Laird*, 4 DeG., M. & G. 772, 23 L. J. Ch. 459. See *ex. gr. Phipson v. Harvett*, 2 C. M. & R. 473.

(*b*) *Comp. Lord Mansfield's dictum in R. v. Abbot*, Doug. 553, sup., § 153.

(*c*) See *ex. gr. Daw v. Metrop. Board*, 12 C. B. N. S. 161. See *Green v. R.*, 1 App. 513. (H. L.)

<sup>100</sup> *Ledlie v. Nav. Co.*, 6 Pa. St. 392.

<sup>101</sup> *Comins v. Turner's Falls Co.*, 138 Mass. 222.

<sup>102</sup> *Re Cont. Elect'n of Martz*, 110 Pa. St. 502.

§ 235. **No Implied Repeal between Penal Acts where Objects not Identical.**—The question whether a new Act impliedly repeals an old one has frequently arisen in construing Acts which deal anew with existing offences without expressly referring to the past legislation respecting them. The problem often arises whether the manner in which the matter is dealt with in the later Act shows that the Legislature intended merely to make an amendment or addition to the existing law, or to treat the whole subject *de novo*, and so to make a *tabula rasa* of the pre-existing law. Of course, where the objects of the two Acts are not identical, each of them being restricted to its own object, no conflict takes place, [but the two stand, though they refer to the same subject.<sup>103</sup>] Thus, an Act which empowered justices to commit for a month an apprentice guilty of any misconduct in his service, was not repealed by a later one which empowered them to compel an apprentice who absented himself to make compensation for his absence, and to commit him, in default, for three months (*a*). The object of the first Act was to punish the apprentice, while that of the other was to compensate the master. [So, where an earlier act was held to give the government a civil remedy for indemnity against one who violated its provisions, and a later one to subject him to criminal liability only, though the description of the offence in both acts was substantially the same, it was held that the later act did not repeal the earlier.<sup>104</sup> And, where an act fixed a tax upon the privilege of standing jacks and also a penalty for the exercise thereof without a license, and a later act changed the tax and provided a remedy for its collection, being silent as to the penalty, it was held that there was no incompatibility between the two acts such as would render the later a repeal of the former so far as concerned the penalty.<sup>105</sup>]

§ 236. **Cumulative Punishments and Procedure.**—It would seem that an Act, which, without altering the nature

<sup>103</sup> *U. S. v. Claffin*, 97 U. S. 546, at p. 552.

(*a*) *Gray v. Cookson*, 16 East, 13. *Comp. R. v. Youle*, *infra*, § 241.

<sup>104</sup> *Stockwell v. U. S.*, 13 Wall. 531; and this decision, though

overruled in its application to the particular statutes in question, was approved in principle, in *U. S. v. Claffin*, 97 U. S. 546.

<sup>105</sup> *Cate v. State*, 3 Sneed (Tenn.) 120.

of the offence, as by making it felony instead of misdemeanour, imposes a new kind of punishment, or provides a new course of procedure for that which was already an offence, at least at common law, is usually regarded as cumulative and as not superseding the pre-existing law.<sup>106</sup> For instance, though the 9 & 10 Will. 3, c. 32, visits the offence of blasphemy with personal incapacities and imprisonment, an offender might also be indicted for the common law offence (a). The 2 W. & M., which prohibited keeping swine in houses in London on pain of the forfeiture of the swine so kept, did not abolish the liability to fine and imprisonment on indictment at common law for the nuisance (b); [just as a statute imposing a penalty for occupying a building in a compact part of the town as a slaughter house, without license, was held not to repeal the common law remedy relative to nuisances.<sup>107</sup>] So, the 3 & 4 W. & M. c. 11, in imposing a penalty of 5*l.*, recoverable summarily, on parish officers who refused to receive a pauper removed to their parish by an order of justices, was held to leave those officers still liable to indictment for the common law offence of disobeying the order, which the justices had authority to make under the 13 & 14 Car. 2, c. 12. In such cases, it is presumed that the Legislature knew that the offence was punishable by indictment, and that as it did not in express terms abolish the common law proceeding, it intended that the two remedies should co-exist (c). At all events, the change made by the new law was not of a character to justify the conclusion that there was any intention to abrogate the old; and in most of the examples cited, the presumption against an intention to oust the jurisdiction of the Superior Courts would strengthen it.

§ 237. **Change in Locality and other Incidents of Punishment.**—  
[No intention to repeal the existing law can, of course, be

<sup>106</sup> See *Mitchell v. Duncan*, 7 Fla. 13. Comp. on this subject, Sedgw., pp. 341-345; Bish., Wr. L. § 156 note.

(a) *R. v. Carlile*, 3 B. & A. 161.

(b) *R. v. Wigg*, 2 Salk. 460.

<sup>107</sup> *State v. Wilson*, 43 N. H. 415; though it was stated, that a statute which should revise the whole

subject, and whose provisions should be inconsistent with the continued operation of the common law, would supersede the latter: *Ibid.*; and see *State v. Norton*, 23 N. J. L. 33, and ante, § 204.

(c) *Stevens v. Watson*, 1 Salk. 45; *R. v. Robinson*, 2 Burr. 800, *per* Lord Mansfield.

inferred from provisions of a statute merely changing the locality for the infliction of the punishment prescribed by an earlier act. Thus, where one act prescribed, as a punishment for a certain offence, imprisonment in the county where it was committed, and another authorized the court to commit the offender, at its discretion, to the house of correction in any county of the commonwealth, and repealed all laws inconsistent therewith, it was held that the latter act did not repeal the whole of the former.<sup>108</sup> Nor would an amendment to a former act, prescribing a different mode of distributing the penalty imposed by the latter, affect the offence or operate as a repeal of the penalty, it working only a modification of the judgment by which the penalty was to be distributed.<sup>109</sup>].

§ 238. **Change in Quality and Incidents of Offence.**—On the other hand, where a statute alters the quality and incidents of an offence, as by making that which was a felony merely a misdemeanor, it would be construed as impliedly repealing the old law. Thus, the 16 Geo. 3, c. 30, which imposed a pecuniary penalty merely, on persons who hunted or killed deer with their faces blackened, was held to have repealed the Black Act (9 Geo. 1, c. 22), which made that offence capital (*a*). [So, a statute making a certain offence a felony punishable by a fine not exceeding \$1,000, and imprisonment in the state's prison not exceeding two years, or both, was held repealed by a subsequent act which reduced the offence to the rank of a misdemeanor, and made it punishable by a fine not exceeding \$100, or imprisonment in the county jail not exceeding two years, or both.<sup>110</sup> Conversely, an act relating to the procurement of abortions, and declaring persons committing any one of certain offences specified in it guilty of manslaughter in the second degree, would be abrogated, at least as to offences committed thereafter, by an act declaring the commission of one of the offences enumerated to be a felony and prescribing a different punishment therefor,—but only as to that one offence, there being no inconsistency between the two acts, and con-

<sup>108</sup> Carter v. Burt, 12 Allen (Mass.) 424.

<sup>109</sup> State v. Wilbor, 1 R. I. 199.

(*a*) R. v. Davis, 1 Leach, 271.

<sup>110</sup> People v. Tindale, 57 Cal.

104.



sequently no repeal by the later one, concerning any of the other offences.<sup>111</sup>]

[But this doctrine has been made subject to exceptions, based upon the supposed intention of the Legislation not to let the later act operate as a pardon for the commission of an offence under an earlier one.<sup>112</sup> Thus, when the change consisted in making two degrees of murder, and mitigating the punishment for the second degree, it was held that there was no repeal.<sup>113</sup> And it has been seen that a change of the minimum limit of grand larceny, by increasing the same from \$5 to \$15, was held not to work a repeal.<sup>114</sup>]

§ 239. **Change in Degree of Punishment.**—Again, where the punishment or penalty is altered in degree but not in kind, the later provision would be considered as superseding the earlier one (*a*). Thus, the 5 Geo. 1, c. 27, which imposed a fine of 100*l*. and three months' imprisonment for a first offence, and fine at discretion and twelve months' imprisonment for the second, was held to be impliedly repealed by the 23 Geo. 2, c. 13, which increased the punishment for the first offence to a fine of \$500*l*. and twelve months' imprisonment, and for the second to \$1,000*l*. and two years' imprisonment (*b*). So, it was held in America that a statute which punished the rescue or harbour of a fugitive slave by a penalty of five hundred dollars, recoverable by the owner for his own benefit, and reserved his right of action for damages, was repealed by a later enactment which imposed for the same offences a penalty of a thousand dollars on conviction, and gave the party aggrieved a thousand dollars by

<sup>111</sup> *Mongeon v. People*, 55 N. Y. 613. See post, § 241.

<sup>112</sup> See post, § 478.

<sup>113</sup> *Com'th v. Gardner*, 11 Gray (Mass.) 438.

<sup>114</sup> *State v. Miller*, 58 Ind. 399, ante, § 195.

(*a*) See *per* Lord Abinger in *Henderson v. Sherborne*, 2 M. & W. 236, and *Atty.-Genl. v. Lockwood*, 9 M. & W. 391; and *per* Martin, B., in *Robinson v. Emerson*, 4 H. & C. 365; *Cole v. Coulton*, 2 E. & B. 395. ["If statutes provide different punishments for the same

offences the later will repeal the earlier :"] *Sedgw.*, p. 100, note cit. *Gorman v. Hammond*, 28 Ga. 85; *Mullen v. People*, 31 Ill. 444; *State v. Horsey*, 14 Ind. 185; *State v. Pierce*, Id. 302; *Mitchell v. Brown*, 1 E. & E. 267. The reason for this rule is, in *Gorman v. Hammond*, *supra*, stated to be that an intention to inflict two punishments for the same offence is not to be imputed to the Legislature.]

(*b*) *R. v. Cator*, 4 Burr. 2026.

way of damages recoverable by action (a). [And in general, it would seem, that, where the penalty imposed by a former statute is increased or diminished by a later one, the latter virtually repeals the first.<sup>115</sup> Thus a statute prohibiting an act under a penalty of \$10, to be recovered by an action of debt by any person suing for the same, is repealed by a later one making the offence indictable and the offender liable to a fine of \$20.<sup>116</sup> Where an act provided that no person should sell wine, brandy, rum, or other spirituous liquors in less quantities than 28 gallons, without license, under a penalty of \$20 for each offence, and a later one, that no inn-holder, retailer, common victualler, or other person should sell any brandy, rum, or other spirituous liquor in a less quantity than 15 gallons under a penalty of not more than \$20 nor less than \$10, it was held, in a case where a person, who was neither an inn-holder nor common victualler, had been convicted, under the first act, of selling, without license, etc., spirituous liquors, that, whilst there was no inconsistency in respect to the seller and the kind and quantity of the liquors sold,<sup>117</sup> there was an inconsistency as to the penalty, and hence the person convicted under the first act could not be sentenced under the second.<sup>118</sup>

[Where, however, the change in the penalty prescribed lay in the direction of leniency, a different rule, founded upon the absence of the intention above referred to,<sup>119</sup> was applied. So, where an act prohibited the sale of liquor on Sunday, and provided a penalty for its violation by both fine and imprisonment, and a later act also forbade the sale of liquor on Sunday and punished the same by fine, it was held that the latter act did not repeal the former by implication.<sup>120</sup> The principles governing, in ordinary cases, in the

(a) *Norris v. Crocker*, 13 Howard, 429.

<sup>115</sup> *Flaherty v. Thomas*, 12 Allen (Mass.) 428; *Leighton v. Walker*, 9 N. H. 59; *Carter v. Hawley*, Wright, (O.) 74; *State v. Whitworth*, 8 Port. (Ala.) 434; *Smith v. State*, 1 Stew. (Ala.) 506. See also, to same effect: *Nichols v. Squire*, 5 Pick. (Mass.) 168; *Gorman v. Hammond*, 28 Ga. 85.

<sup>116</sup> *Buckalew v. Ackerman*, 8 N. J. L. 48. See as to the converse :

*Bush v. Republic*, 1 Tex. 455, post, § 241.

<sup>117</sup> "They (the acts) are alike except as to wine; but as the charge against the defendant is not the selling of wine, but spirituous liquors, this distinction is immaterial :'' see case below.

<sup>118</sup> *Com'th v. Kimball*, 21 Pick. (Mass.) 373.

<sup>119</sup> See supra, § 238.

<sup>120</sup> *Sifred v. Com'th*, 104 Pa. St. 179.

ascertainment of the intention impliedly to repeal an earlier act in *pari materia* were applied in this case, and it was found that there was no such repugnancy between the two acts as prevented them from standing together; that there was, moreover, no intention discoverable from the later act to make it operate as a repeal of the earlier; and it was said, that, in the absence of any expression or intimation of such a design, the fact that, to give it such operation would strike from the earlier acts all power of the courts to sentence to imprisonment persons convicted of the offences therein stated, was a result, an intent on the part of the Legislature to produce which it was impossible to assume. "We are not questioning legislative power to repeal or modify the sentences to be imposed. We are merely considering the question of implied intention, to be gathered from the language used."<sup>121</sup>

§ 240. **Where Degree of Crime is Preserved.**—[An intention not to repeal by a change of penalty has also been inferred from an express preservation of the degree of guilt affixed to the act in question by a former statute. Thus, where an act made the forging of certain bank checks a felony, punishable by fine and imprisonment at solitary labor for not less than seven nor more than ten years, and a later one changed the punishment to imprisonment at labor for not less than one nor more than seven years, for the first offence, and the like imprisonment, not exceeding ten years, for the second, but declared that "all definitions and descriptions of crimes: all fines, forfeitures, penalties, and incapacities," etc., and every other matter not particularly mentioned, should remain as theretofore, it was held, that, the degree of felony evidently not having been changed, that being part of the definition and description of the crime and involving an incapacity in the convict to be a witness, the former act

<sup>121</sup> *Ib.*, p. 184. See also, *Miles v. State*, 40 Ala. 39, where an act speaking as "from and after the passage" thereof, and prescribing a different punishment, was held not to repeal the former law as to past offences. In the case of *Sifred v. Com'th*, *supra*, the absence of any

reference to the earlier act in the later is emphasized as negating an intention to repeal, and in *Mitchell v. Duncan*, 7 Fla. 13, it is said that there should be some notice taken of the former act to indicate an intention in the later to repeal it.

was not to be deemed repealed by the later.<sup>122</sup> In such a case, the later act operates, instead of by way of repeal, by way of modification of the earlier act.<sup>123</sup>

§ 241. **Statute Covering Whole Subject Matter.**—But it has been laid down generally, that if a later statute again describes an offence created by a former one, and affixes a different punishment to it, varying the procedure; giving, for instance, an appeal where there was no appeal before, directing something more or something different, something more comprehensive; the earlier statute is impliedly repealed by it (a). [This principle is analogous to that, already discussed,<sup>124</sup> which gives to a statute covering the whole subject matter of an earlier one, and evidently intended as a substitute for it, the effect of impliedly repealing it.<sup>125</sup> It is said that a statute on the subject of a former one, embracing all its provisions and also others, and imposing different or additional penalties, repeals the prior one by implication;<sup>126</sup> and so does an act covering the whole subject matter of a former one, adding offences and varying the procedure.<sup>127</sup> But, in order to constitute a repeal of a statute by implication, such

<sup>122</sup> *Drew v. Com'th*, 1 Whart. (Pa.) 279.

<sup>123</sup> See ante, §§ 215–216; and see Wilb., p. 322: “The difference between repeal and modification may also be illustrated by the treatment of statutes by which penalties are inflicted. Where the punishment prescribed in an earlier Act is substantially altered by a succeeding act, the earlier statute is repealed; but if the second act merely adds a cumulative penalty, the first act remains in full vigor.” And such is clearly the case also where the second act, without affecting the crime as a crime, merely modifies the penalty by decreasing it. In *Turner v. State*, 40 Ala. 21, it was held that a law merely providing another alternative punishment for an offence, in mitigation of the punishment prescribed by a former act, may operate on offences already committed, without being *ex post facto*,—citing *Calder v. Bull*, 3 Dall. 386. In *Greer v. State*, 22 Tex. 588, it was held that an

offence may be punished either under the law as it stood at the time of its commission, or under the law as it stands at the time of trial, if the punishment is mitigated; or possibly, the defendant may elect under which he is to be punished.

(a) *Per Cur.* in *Michell v. Brown*, 2 E. & E. 267, 28 L. J. M. C. 55; *per Bramwell, B.*, in *Exp. Baker*, 2 H. & N. 219, 26 L. J. M. C. 164; *per Martin, B.*, in *Youle v. Mappin*, 30 L. J. M. C. 237. *Comp. R. v. Hoseason*, 14 East, 605, and *per Lord Hardwicke* in *Middleton v. Crofts*, 2 Atk. 674. [See *Nusser v. Com'th*, 25 Pa. St. 126, ante, § 231, n. 95.]

<sup>124</sup> See ante, §§ 200–202.

<sup>125</sup> See *Com'th v. Kelliher*, 12 Allen (Mass.) 480, 481; *West. Union Tel. Co. v. Steele*, 108 Ind. 163.

<sup>126</sup> *U. S. v. Tynen*, 11 Wall. 88. See also *State v. Smith*, 44 Tex. 443; *Johns v. State*, 78 Ind. 332; *Poe v. State*, 85 Tenn. 495.

<sup>127</sup> *U. S. v. Claflin*, 97 U. S. 546.

later act must not only refer to the same subject, and also have the same object in view as the earlier,<sup>128</sup> but it must cover the whole subject matter of the same.<sup>129</sup> A change merely in the punishment for larcenies of over \$2,000 can, of course, repeal only pro tanto the existing law as to larceny,<sup>130</sup> —just as the change of one of a series of offences made manslaughter in the second degree by the earlier act, to felony, can repeal the earlier act only as to that one particular.<sup>131</sup> The 6 Geo. 3, c. 25, which made an artificer or workman who absented himself from his employment, in breach of his contract, liable to three months' imprisonment, was held to be impliedly repealed by the 4 Geo. 4, c. 34, which punished not only that offence, but also that of not entering on the service, after having contracted in writing to serve, with three months' imprisonment, plus a proportional abatement of wages for the time of such imprisonment; or in lieu thereof, with total or partial loss of his wages and discharge from service (a). So the 11th section of the 54 Geo. 3, c. 159, which imposes a penalty of 10*l.*, leviable not by distress but by imprisonment in default of immediate payment, on any person throwing ballast or rubbish out of a vessel into a harbor or river so as to tend to the obstruction of the navigation, and gives an appeal; was held to repeal by implication the earlier Act, 19 Geo. 2, c. 22, which had imposed, without appeal, a penalty of not less than fifty shillings and not more than 5*l.* for the same offence, leviable by distress or imprisonment in default of distress. The preamble of the later Act, indeed, recited that it was expedient to "extend" the provisions of the earlier one, and though its implied repeal seems to have been thought at variance with such an intention, it may be questioned whether its provisions were not "extended" by what was, in effect,

<sup>128</sup> Ibid. See ante, § 235.

<sup>129</sup> Coghill v. State, 37 Ind. 111.  
See Hamlyn v. Nesbit, Id. 284.

<sup>130</sup> State v. Grady, 34 Conn. 118.

<sup>131</sup> See Mongeon v. People, 55 N. Y. 613, ante, § 238. But where, e.g., an act required the owners of dogs to cause them to be registered, numbered and described, and licensed, in the town or city where the owner resided, and imposed a

penalty for noncompliance, an act requiring the same to be done in the city or town where the dog was kept, but imposing no penalty, would clearly operate as a repeal of the former: Com'rh v. Kelliher, 12 Allen (Mass.) 480.

(a) R. v. Youle, 6 H. & N. 753; Youle v. Mappin, 30 L. J. 234, S. C. Comp. Owens v. Woosm<sup>th</sup> sup., § 219.

their re-enactment with an increased penalty and a summary method of its recovery (*a*). Where a local Act imposed on "all persons" engaged in making gas, who suffered impure matter to flow into any stream, a penalty of 200*l.*, recoverable by a common informer by action, and a further penalty of 20*l.* for every day the nuisance was continued, payable to the informer or to the party injured, as the justices thought fit; and the General Gasworks Clauses Act of 1847 afterwards imposed the same penalty on the "undertakers" of gasworks authorized by special Act, recoverable by the party injured; it was held that the earlier Act was repealed as regarded such undertakers (*b*).

§ 242. [An exception to this rule, upon what would seem sound reason, in accordance with legislative intent, was made in the case of an act that provided an entire new system for the granting of licenses to sell liquor, and prescribed punishments, differing from those inflicted by previous statutes, for the violation of its various provisions. It, however, permitted licenses to be granted under the old law, up to a certain date. It was held that the old law must be deemed to be continued in force as to all licenses granted under it, during the life of each license so granted.<sup>122</sup>]

§ 243. **Revenue Laws.**—It has been observed by the Supreme Court of the United States, that in the interpretation of laws for the collection of revenue, whose provisions are often very complicated and numerous, in order to guard against frauds, it would be a strong proposition to assert that the main provisions of any such laws were repealed, merely because in subsequent laws other powers were given, and other modes of proceeding were provided, to ascertain whether any frauds had been attempted. The more natural inference is that such new laws are auxiliary to the old (*c*).

(*a*) *Michell v. Brown*, 2 E. & E. 257, 28 L. J. M. C. 53.

(*b*) *Parry v. Croydon Gas Co.*, 15 C. B. N. S. 568. [But where a statute prohibited an act under a penalty, to be enforced by indictment, a subsequent statute giving a *qui tam* action for such penalty was held to be merely cumulative and not to repeal the remedy given

by the former statute: *Bush v. Republic*, 1 Tex. 455. Compare, as to the converse, ante, § 239.]

<sup>122</sup> *Sanders v. Com'th*, 20 W. N. C. (Pa.) 226.

(*c*) *Per Cur.* in *U. S. v. Wood*, 16 Peters, 342, 353. [See also: *U. S. v. 67 Packages*, 17 How. 85; *U. S. v. 100 Barrels*, 2 Abb. U. S. 305.]

§ 244. **Secondary Meaning.**—But little weight can attach to the argument, that because an offence falls within two distinct enactments in their ordinary meaning, a secondary construction is to be sought in order to exclude it from one of the two. Thus, an enactment which prohibited under a penalty any person concerned in the administration of the poor laws from supplying goods ordered for the relief of any pauper, was not construed as excluding a poor law guardian, merely because another provision expressly made such officers liable to a much higher penalty for supplying the parish workhouse with goods (*a*). Where one section of an American Act enacted that no ship from a foreign port should unload any of its cargo but in open day, on pain of forfeiture of both goods and ship, and another prohibited the unloading of any ship bound for the United States, before she arrived at the proper place of discharge of her cargo, on pain of forfeiture of the unladen goods; it was held that a foreign ship bound for New York, and unloading a part of her cargo at night at an intermediate harbour in the United States, did not escape from falling within the former section, merely because it fell also within the latter. It was observed that there was no principle of law or interpretation to authorize a Court to withdraw a case from the express prohibitions of one clause, on the ground that the offence was also punished by a different penalty in another. Neither could be held nugatory (*b*).

However, where a statute by one section empowered justices to order the abatement of a nuisance, punishing disobedience of their order with a fine of 10s. a day, and by another section empowered them to prohibit the recurrence of the nuisance under a penalty of 20s. a day, it was held, in a case where orders had been made at different times under both sections, and two informations were laid for a breach of both by a fresh act of the same nuisance, that there could be only one conviction (*c*).

(*a*) *Davies v. Harvey*, L. R. 9 Q. 114.  
B. 433.

(*c*) 18 & 19 Vict. c. 121; *Eddlestone v. Barnes*, 1 Ex. D. 67.

## CHAPTER IX.

## PRESUMPTION AGAINST UNREASON, INCONVENIENCE, INJUSTICE AND ABSURDITY.

- § 245. Presumption against Unreason.
- § 251. Presumption against Inconvenience.
- § 253. Joint and Several Offences and Penalties. **Complex Act.**
- § 257. Actions for Penalty where Several are Aggrieved.
- § 258. Presumption against Injustice.
- § 262. Summary Proceedings.
- § 263. Limits of Effect of Presumption against Injustice.
- § 264. Presumption against Absurdity
- § 265. Construction *ut magis valeat*, etc.
- § 266. Caution as to Application of Presumption against Unreason, etc.

§ 245. **Presumption against Unreason.**—In determining either what was the general object of the Legislature, or the meaning of its language in any particular passage, it is obvious that the intention which appears to be most agreeable to convenience, reason, and justice, should, in all cases open to doubt, be presumed to be the true one. An argument drawn from an inconvenience, it has been said, is forcible in law (*a*); and no less force is due to any drawn from an absurdity or injustice. The treaty between Louis XII. and the Pope, which gave the king the right of appointing to “all bishoprics vacated by the death of bishops in France,” was, for instance, properly construed, not as giving him the right of appointing to a foreign bishopric whenever its incumbent happened to die in France, but, more consistently with good sense and convenience, as authorizing him to fill the bishoprics of his own kingdom, when their holders died, whether at home or abroad (*b*). [It will not be presumed that the Legisla-

(*a*) Co. Litt. 97a.

(*b*) Puff. L. N. B. 5, c. 12, s. 8.



ture intends what is unreasonable.<sup>1</sup>] If a statute gives an appeal from a magistrate's decision, "when the sum adjudged to be paid on conviction shall exceed two pounds," the question whether the penalty only, or the penalty plus the costs was intended, would be decided on similar general considerations of convenience and reason. It would be thought more likely that the Legislature intended to give an appeal only when the offence was of some gravity, and not merely where the costs (which would vary according to the distances to be traveled by the parties and their witnesses, the number of the latter, and similar accidental circumstances) happened to swell the amount above the fixed limit (*a*). [So, in civil actions, where the judgment of a magistrate not exceeding \$20 is, by statute, made final and conclusive as to both plaintiff and defendant, without right of appeal therefrom, it is held that the sum in controversy, and not the amount of the judgment entered, determines the right of appeal.<sup>2</sup> And where a statute provided that either party should have an appeal where the judgment given by the magistrate should exceed \$5.33, it was held that the plaintiff had the right of appeal, where his claim exceeded that amount, from the judgment of a magistrate in favor of the defendant.<sup>3</sup> Strictly and literally taken, no doubt, the provision would seem to mean, that if the plaintiff sue for damages suffered by him to the amount, *e. g.*, of \$100, he might appeal, if he be aggrieved by a judgment in his favor one cent short of his full demand, but that he must be concluded if he be aggrieved by a judgment against him to the amount of his entire claim,—a proposition so unreasonable that respect for the Legislature was said to forbid its adoption, and the court was led to entertain the somewhat strained view, that, in denying

<sup>1</sup> *Neenan v. Smith*, 50 Mo. 525. As an application of this doctrine to a municipal ordinance, see *Ellis v. Milw. City R. Co.*, 67 Wis. 135, where such an ordinance, limiting the fare to be charged on a street railway running between the same termini to 5 cents, was held not to permit a passenger, for 5 cents, to ride on a car bound for one terminus, and then, at a point of

divergence, get on another car and ride to a different terminus.

(*a*) *R. v. Warwickshire*, 6 E. & B. 837, 25 L. J. M. C. 119.

<sup>2</sup> *Klinginsmith v. Nole*, 3 Pen. & W. (Pa.) 120; *Downey v. Ferry*, 2 Watts (Pa.) 304.

<sup>3</sup> *Stewart v. Keemle*, 4 Serg. & R. (Pa.) 72; *McCloskey v. McConnell* 9 Watts (Pa.) 17.

judgment to a plaintiff, whose demand exceeded \$5.33, the magistrate virtually entered a judgment against him for such amount. "What is the case more or less than this? The plaintiff brings a suit for goods of the value of seventy-five dollars. The judgment is given by the justice or alderman against him. The justice or alderman then gives a judgment exceeding \$5.33. He gives a judgment against him for the amount which he claims." In consonance with this view, it was also held under an act which gave a limited jurisdiction in civil actions when the debt or damages demanded did not exceed \$20, that the test of the existence of the jurisdiction was the amount of damages demanded, not the amount actually due, for instance, upon a note, when the action was begun. Hence, as the amount to which plaintiff was entitled could not be judicially ascertained to be less than the damages demanded, the fact that the judgment was for less than \$20 could not affect the jurisdiction.⁹]

§ 246. An Act regulating local rates, which gave an appeal against any rate to the Quarter Sessions, and provided, for enforcing its payment, that two justices might issue a distress warrant against the goods of the defaulter, if he did not, on being summoned, "prove to them that he was not chargeable with, or liable to pay such rate," would not be construed as authorizing the justices to enter upon any inquiry into the validity of the rate, if it was valid on its face; though, literally, the defaulter would unquestionably prove his non-liability, if he proved its invalidity. If the question of validity, which was left to the Quarter Sessions, was also open to the justices required to enforce the rate, they might decide against the validity of the rate after it had been adjudged valid by the Quarter Sessions (a); a conflict which could not readily be supposed to have

⁴ *Stewart v. Keemle*, supra, at p. 74, *per* Duncan, J.

⁵ *Cole v. Hayes*, 78 Me. 539. See also *Ladd v. Kimball*, 12 Gray (Mass.) 139.

(a) *Birmingham v. Shaw*, 10 Q. B. 868; *Exp. Williams*, 2 E. & B. 84; *R. v. Kingston*, E. B. & E.

256, 27 L. J. 199; *R. v. Bradshaw*, 2 E. & E. 836, 29 L. J. 199; *R. v. Higginson*, 2 B. & S. 471, 31 L. J. M. C. 189; *Exp. May*, 2 B. & S. 426, 31 L. J. 161; *R. v. Linford*, 7 E. & B. 950; *R. v. Finnis*, 28 L. J. M. C. 201

been intended. It would be otherwise, indeed, if the rate bore invalidity on its face, by not showing that it was made in accordance with the statutory authority given for the purpose ; for they could not be required to enforce what did not profess to be a valid demand made by competent authority (*a*).

An Act to provide protection against dogs which empowered magistrates to make an order that any dog found to be dangerous should "be kept under proper control or destroyed," would, on this principle, be construed as giving the magistrate the option of making an absolute order for the destruction of a dangerous dog ; not as requiring that his order should be in the alternative terms of the Act, which would place the option in the hands of the owner of the dog ; for this would be much less efficacious and convenient (*b*).

§ 247. The 24 & 25 Vict. c. 98, which, after making it felony to engrave without authority plates of banknotes purporting to be notes of the Bank of England or of Ireland, or of any other company, declared in another section that the enactment should not apply to Scotland, except where it was expressly so provided, was held to apply to the engraving of the notes of a Scotch bank ; the rational object and meaning of the excluding provision being, not that forgeries against Scotch banks might be committed in England with impunity, but that, when committed in Scotland, they should not fall within the Act (*c*).

Where an Act, after transferring all duties of paving and lighting from existing Commissioners to a Board of Works, provided that all contracts with the former should remain valid, that no action upon them against the commissioners should abate, and that all liabilities under such contracts should be paid out of rates to be made by the new Board ; it was held, on the ground of its being the more convenient course, that an action on a contract made with the Commissioners might be brought against the Board (*d*). The 20 &

(*a*) *R. v. Eastern Counties R. Co.*, 5 E. & B. 974, 25 L. J. M. C. 49. See *R. v. Croke*, Cowp. 30.

(*b*) *Pickering v. Marsh*, 43 L. J. M. C. 143.

(*c*) *R. v. Brackenridge*, L. R. 1 C. C. 133. Comp. *Re O'Loughlin*, L. R. 6 Ch. 406.

(*d*) *Sinnott v. Whitechapel*, 3 C. B. N. S. 674, 27 L. J. C. P. 177.

21 Vict. c. 43, which authorizes a party aggrieved by a decision of justices to apply within three days for a case, and directs that "at the time of the application," and before the case is delivered to him, he shall enter into recognizances to prosecute the appeal, was held substantially complied with if the recognizances were entered into within three days, though not at the time of the application (a). [So, under a statute requiring an affidavit on appeal to be filed immediately, it is in time if filed the day after judgment.<sup>6</sup> And a statute requiring a judge's certificate that an action was really brought to try a right to be filed immediately after verdict delivered, was held not to mean as soon as ever the verdict was delivered, but as implying that the judge must, of necessity, have some little time for reflection.<sup>7</sup>] It has been repeatedly held that when an Act gives an appeal to the "next" sessions, it means not necessarily the next which takes place in order of time, or an adjournment of it (b), but the next to which it is practicable with fair diligence to carry the appeal (c). It is obvious that a stricter construction would often have the effect of taking away the appeal which the Legislature intended to give.<sup>8</sup> [A provision in a statute

(a) *Chapman v. Robinson*, 1 E. & E. 25, 28 L. J. M. C. 30. [*Add'n.*]

<sup>6</sup> *State v. Clevenger*, 20 Mo. App. 626.

<sup>7</sup> *Sedgw.*, p. 259, cit. *Thompson v. Gibson*, 8 M. & W. 288; *Page v. Pearce*, Id. 677, but referring to *Grace v. Church*, 4 Q. B. 606; *Shuttleworth v. Cocker*, 1 M. & G. 829. See post, § 395. *Comp. Robertson v. Robertson*, L. R. 8 P. D. 96, that, whatever the meaning of the word "on" might be, in respect of the proximity of action contemplated by it, it must mean shortly after, if it be not, indeed, confined to the time of making the decree, and it would be difficult to extend it to a period exceeding a year: *per Jessel, M. R.*

(b) *R. v. Sussex*, 7 T. R. 107.

(c) *R. v. Yorkshire*, 1 Doug. 192; *R. v. Dorsetshire*, 15 East, 200; *R. v. Sussex*, 15 East, 206; *R. v. Essex*, 1 B. & A. 210; *R. v. Thackwell*, 4 B. & C. 62; *R. v. Devon*, 8 B. & C. 640; *R. v. Sevenoaks*, 7

Q. B. 136; *R. v. Sussex*, 4 B. & S. 966, 34 L. J. M. C. 69. See *R. v. Trafford*, 15 Q. B. 200; *R. v. Watts*, 7 A. & E. 461; *R. v. West Riding*, E. B. & E. 713.

<sup>8</sup> But where an act required the entry of an appeal from the judgment of a justice of the peace in the office of the prothonotary of the court of common pleas on or before the first day of the term next after perfecting the appeal, for which purpose the act allowed twenty days after entry of the judgment, it was held that the appeal must be filed to the next term, though taken before the expiration of the twenty days, and though the first day of such term came before their expiration: see *Moore v. Creamer*, 3 Penr. & W. (Pa.) 416. But it did not require the appellant to forego any of the twenty days allowed him, in order to enter his appeal to the next term after the judgment had been rendered: *Potts v. Staeger*, 12 Pa. St. 363.

requiring that execution upon a judgment rendered by a justice of the peace "shall be directed to the constable of the ward, district or township where the defendant resides, or the next constable most convenient to the defendant," it was said that force must be given as well to the words "most convenient" as to the word "next;" there might be several districts adjacent to that in which the defendant lived, and to which the word "next" might apply, and in such case the selection of a constable from one of the districts might be determined by the question of convenience, of which the magistrate must be the judge. Again, the constables of such districts might be unable, by reason of sickness or absence, to perform the required duty, or disqualified by reason of interest or otherwise, and in all these cases convenience or necessity might require the selection of a constable who was not "next to the defendant." When an Act gave any person aggrieved (a) by an order of justices, four months "for making his complaint to the Quarter Sessions," it was construed to mean, not that the complaint must be heard within that time, but that the appellant should have that time for notifying his intention to appeal; otherwise he might sometimes be limited to a few weeks, or, if no sessions were held within the four months, he would be deprived of his appeal altogether (b). [The period of twelve months, until the expiration of which, under a Connecticut statute, a highway, after being laid out, shall not be laid open or occupied, is held to begin to run from the time when, by the combined measures of the select men and the town, the road shall have been legally established.<sup>10</sup>]

<sup>9</sup> Com'th v. Lentz, 106 Pa. St. 643. It was also held in this case, that, whilst a constable of another ward, etc., than as specified in the act, might, if he chose, accept and execute such an execution directed to him, he was not bound to do so, and no action could, in case of his refusal, be maintained upon his official bond for that cause.

(a) See R. v. Middlesex, 3 B. & Ad. 938; R. v. Toole, 1 M. & R. 728; Wood v. Heath, 4 M. & Gr. 918; R. v. Chichester, 29 L. J. Q. B. 23; Hollis v. Marshall, 2 H. &

N. 755, 27 L. J. 235; R. v. Graves, L. R. 4 Q. B. 715; Boyce v. Higgins, 14 C. B. 1, 23 L. J. 5; Exp. Learoyd, 10 Ch. D. 5, 48 L. J. 17; Exp. Thoday, 2 Ch. D. 229; Verdin v. Wray, 2 Q. B. D. 608; comp. Rochfort v. Atherley, 1 Ex. D. 511; *Re* Shaftoe's Charity, 3 App. 872, 47 L. J. 98.

(b) R. v. Essex, 34 L. J. M. C. 41; R. v. Middlesex, 6 M. & S. 279. [And see ante, § 77; R. v. Hants, 1 B. & Ad. 564.]

<sup>10</sup> Wolcott v. Pond, 19 Conn. 597.

§ 248. The statute which enacts that "a solicitor may make an agreement in writing with his client respecting the amount and manner of his remuneration," was held to require impliedly that the agreement should be signed by the client; as otherwise it would be possible for a solicitor to place a document signed by himself only, and containing terms favourable to him, before his client, and then contend that the latter was bound by it (*a*).

Where one Act authorised the recovery of certain claims before justices of the peace, proceedings before whom are limited to six months, and another Act authorised their recovery, when not exceeding twenty pounds, in the County Courts, where the term of limitation is six years, it was held that suits for them in the latter Courts were limited to six months, to avoid imputing to the Legislature the anomalous intention of allowing six years for the recovery of small sums, while giving only six months for large ones (*b*).

Bankruptcy Acts which vest the future as well as the present property of the bankrupt in the assignee or trustee, import the necessary exception, to save him from starving, of the remuneration which the bankrupt may earn by his labour after his bankruptcy," and the damages which he may recover for any personal injury (*c*). The Act which imposes a penalty on the piracy of a dramatic work, or "any part thereof," would not be broken unless a material and substantial part was pirated. It is not to be supposed that the Legislature intended to punish the misappropriation of what was of no value (*d*). [Nor would an act directing, that, in all actions for the sale of any spirituous, vinous or malt liquors, the fact that such liquors or admixtures thereof

(*a*) *Re Lewis*, 1 Q. B. D. 725.

(*b*) 11 & 12 Vict. c. 63, s. 39; 24 & 25 Vict. c. 61, s. 24; *Tottenham Board v. Rowell*, 1 Ex. D. 514. See also the judgment of the Exchequer Chambers, in *Nicholson v. Ellis*, E. B. & E. 267, 28 L. J. Q. B. 238.

<sup>11</sup> "A man's creditors have no legal claim on his labor, unless his earnings are realized and invested in some kind of property, which can be reached by process of exe-

cution:" *Welch v. Kline*, 57 Pa. St. 428, 432. See also *Whedon v. Champlin*, 59 Barb. (N. Y.) 61.

(*c*) *Beckham v. Drake*, 2 H. L. 579; *Re Wilson*, 8 Ch. D. 631, 47 L. J. Bcy. 116.

(*d*) *Chatterton v. Cave*, 2 C. P. D. 42; 3 App. 483; *Pike v. Nicholas*, L. R. 5 Ch. 251; *Bradbury v. Hotten*, L. R. 8 Ex. 1; *Planché v. Braham*, 4 Bing. N. C. 7; *D'Almaine v. Boosey*, 1 Yo. & C. 301.

were impure, vitiated or adulterated, shall constitute a good and sufficient defense to the whole of plaintiff's demand, apply, except where the quality or value of such liquors had been impaired by the impurity, vitiation or adulteration.<sup>13</sup>

§ 249. [Under an act authorizing the entry of judgment in suits upon certain causes of action against the defendant, unless an affidavit of defense be filed by him before the third Saturday succeeding the return day of the original writ, it was held that the proceeding was inapplicable to the case of a defendant not actually served with process; as, *e. g.*, in a suit begun by foreign attachment, where the defendant was absent and might not be in court until after the expiration of the time allowed for filing the affidavit.<sup>14</sup> An act making it the duty of the overseers of every poor-district to furnish relief to poor persons not having a settlement therein, "until such person can be removed to the place of his last settlement," was held to contemplate a removal with safety to the pauper's health and life.<sup>15</sup> Where an act declared that "all judgments, which, at the time of the death of a decedent, shall be a lien on his real estate, shall continue to bind such real estate during the term of five years from his death," it was held that it must be interpreted as relating to lands of which he was seized at the rendition of the judgment, because otherwise the statute might be frustrated by a sudden alienation shortly before death.<sup>16</sup> So, under an act, that judgments against collecting officers should be "for the principal due, with interest at the rate of ten per cent. per annum from the first day of June preceding and until paid," it was held, that, as the interest was designed to be a penalty for failure to pay over at the

<sup>13</sup> *Clohessey v. Roedelheim*, 99 Pa. St. 56. It is said, in the decision of this case, that the mischief to be remedied, and the phrase "admixtures thereof," indicated that the act did not mean to punish the introduction of any substance, foreign to and not essential in, the manufacture of pure liquors, but only deteriorating and noxious impurities.

<sup>14</sup> *Grant v. Hickox*, 64 Pa. St. 334. See post, § 267.

<sup>15</sup> *Kelly Tp. v. Union Tp.*, 5 Watts. & S. (Pa.) 535. The removal of a pauper in a condition of health which forbade it, and made an attempt at removal an act of cruelty, and a risk of life, it was said, would subject the overseers to indictment.

<sup>16</sup> *Nicholas v. Phelps*, 15 Pa. St. 36.

time appointed by law, the act must be construed to mean, from the first day of June preceding the time when the money should have been paid into the treasury.<sup>16</sup> Where an ordinance required owners to pave in front of their property, and on neglect, after twenty day's notice "left or placed on the premises, if the owner was unknown or could not be found," the commissioner of highways should pave and file a lien for the cost, and a notice to pave was folded up and placed on the premises, under a stone which completely covered it, it was held that this was not a sufficient notice under the ordinance.<sup>17</sup> A provision that a person tried and found guilty should not be entitled to a new trial, etc., "for any of the following causes," was held to mean "for any one" of the causes enumerated.<sup>18</sup> Acts establishing boom companies, and imposing on the owners of lumber the duty of paying toll for the security and preservation of their property caught in such booms, have been held not to apply to rafts intended to pass down the river, but accidentally stopped by the boom, where their owners neither sought nor desired its use or protection.<sup>19</sup> Laws requiring affidavits of defense to be filed in certain actions upon contracts, and entitling the plaintiff to judgment for default thereof within a certain time, have been uniformly held not to apply to executors or administrators, because, "in no ordinary case would it be possible for a personal representative to set out on oath in specific detail the nature and incidents of a transaction to which his decedent had been a party, and to which he was a stranger."<sup>20</sup> And an exception was made in favor of infants from the general language, broad enough to cover them, of a statute requiring the filing of statements of claim to land, or "be forever barred," etc., because of the hardship of any other construction, and the omission of any provision for the making of such statements by guardians and the like.<sup>21</sup> Under an

<sup>16</sup> *Samuels v. Com'th*, 10 Bush, (Ky.) 491.

<sup>17</sup> *Philadelphia v. Edwards*, 78 Pa. St. 62.

<sup>18</sup> *Thurston v. State*, 3 Coldw. (Tenn.) 115; so that, if more than one of the causes coexisted, the

person might be entitled to a new trial: *Ibid*.

<sup>19</sup> *Chase v. Dwinal*, 7 Greenl. (Me.) 134.

<sup>20</sup> *Seymour v. Hubert*, 83 Pa. St. 346, 348.

<sup>21</sup> *Coy v. Coy*, 15 Minn. 119.



act which permits the transfer of judgments from one county to another by certified transcript of the record, and directs that the case may then be proceeded in and the judgment and costs collected by execution, etc., execution cannot be issued by the court of the county in which the transcript is filed without a revival of the judgment there, when none can be issued, for want of a revival, in the county in which the original judgment remains.<sup>22</sup> Where a general railroad law prohibits a railroad company from running its line through any dwelling house in the occupancy of the owner thereof, without his consent, the phrase dwelling house includes the curtilage, so far as necessary, for a reasonable and proper enjoyment of the house as a residence, in view of its location and surroundings.<sup>23</sup> An exemption of swine from attachment, in an act intended for the protection of poor debtors, must, in reason, be construed to include the living and dead and dressed animal.<sup>24</sup> Under an act authorizing the laying out of a road "from" Bowdoin College, one starting seventeen rods from the college buildings and eight rods from the land appropriated to the use of the college was held well laid out.<sup>25</sup> A statute authorizing the abandonment of a canal on approval of the project by at least two-thirds of the stockholders of the company, was held satisfied by the approval of a single stockholder who held more than two-thirds of the stock.<sup>26</sup> Under an act directing a contract to be awarded to the "lowest bidder," the determination of the question whether a bid is the lowest, reasonably

<sup>22</sup> *Bank v. Church*, 113 Pa. St. 200.

<sup>23</sup> *Swift's App.* (Pa.) 2 Centr. Rep. 211. *Comp. Wells v. R. R. Co.*, 47 Me. 345. For construction of the word "house," in similar connections, see *Bennett v. Bittle*, 4 Rawle, (Pa.) 339, 342; *Rogers v. Smith*, 4 Pa. St. 93, 101; *Cole v. Ry. Co.*, 27 Beav. 242; *Grosvenor v. Ry. Co.*, 26 L. J., Ch. 731; *King v. Ry. Co.*, 29 Id. 462; *Marson v. Ry. Co.*, 1 Kay & J. 34; 5 DeG., M. & G. 851. But under the 18 & 19 Vict. c. 123, § 9, providing that no ground to be used as, or appropriated for, a cemetery shall be used for burials "within the distance of one hundred yards from any

dwelling-house," without the consent of the latter's owner, lessee or occupier, it is held that the phrase "dwelling-house" does not include the curtilage, and the one hundred yards must be measured from the walls of the house: *Wright v. Wallasey Local B'd*, L. R. 18 Q.B. D. 783.

<sup>24</sup> *Gibson v. Jenney*, 15 Mass. 205. But see for construction, including only living turkeys, etc., *R. v. Halloway*, 1 C. & P. 128; *R. v. Edwards*, 1 Russ. & Ryan, 497.

<sup>25</sup> *Stanford v. Peirce*, 7 Mass. 458.

<sup>26</sup> *Fredericks v. Canal Co.*, 109 Pa. St. 50.

involves a comparison not only of figures, but of the quality and utility of the thing offered and its adaptability to the purpose for which it is intended ;<sup>27</sup> and a direction to award to the "lowest responsible bidder" does not refer to pecuniary responsibility alone, but also to judgment and skill.<sup>28</sup> Where an act provided that, upon the decision that a pauper had been improperly removed, the town to which he was removed should be reimbursed for the cost of his support, it was held inapplicable in a case, where, the decision not being upon the merits, the town would, by a literal interpretation, be repaid the expense of maintaining its own pauper.<sup>29</sup>

§ 250. [The Georgia statute of 16 March, 1869, requiring actions for the enforcement of rights of individuals under acts of incorporation or by operation of law, accrued prior to June 1, 1865, to be brought before January 1, 1870, was held not to apply to claims against the estates of decedents, so as to restrict or exclude the time a previous statute allowed to administrators to ascertain the condition of the estates committed to their care, and to creditors to file their claims, it being deemed unreasonable to suppose that the Legislature, having already made provision for these cases, intended to repeal them by an act aimed at the settlement of affairs left in confusion by the disturbances of the civil war.<sup>30</sup> Nor was the general and inconclusive language of a later enactment permitted to abrogate express exception from jurisdiction made by an earlier one, where the effect would have been to confer upon a court of limited jurisdiction power to try Indians and others, strangers to civilized life, by standards unknown and in reason inapplicable to them.<sup>31</sup> Upon the same ground, the reasonableness of the construction adopted, it was held that, under an act "giving a summary remedy to landlords, before justices of the peace, to regain possession of the property demised by them upon the

<sup>27</sup> Cleveland, etc., Tel. Co. v. Metrop. Fire Comm'rs, 55 Barb. (N. Y.) 288 ; 7 Abb. Pr. N. S. 49; and see Frost v. Fay, 3 Lans. (N. Y.) 398.

<sup>28</sup> Douglass v. Com'th, 108 Pa. St. 559 ; Com'th v. Mitchell, 82 Id. 343 ; Findley v. Pittsburgh, Id. 351.

<sup>29</sup> Ryegate v. Wardsboro, 30 Vt. 746. See post, § 266.

<sup>30</sup> Mills v. Scott, 99 U. S. 25, approving Moravian Sem'y v. Atwood, 50 Ga. 382 ; Edwards v. Ross, 58 Id. 147.

<sup>31</sup> Exp. Crow Dog, 109 U. S. 556.

<sup>32</sup> 14 Dec. 1863, P. L. 1125, Pa

expiration of the lease, and notice, the provision in former acts, which ousted the jurisdiction of the justice upon the filing of an affidavit by defendant that the title to real estate would come in question, was inapplicable.<sup>39</sup>

§ 251. **Presumption against Inconvenience.**—[It is said, that, where the intention of the Legislature or the law is doubtful and not clear, the judges ought to interpret the law to be what is most consonant to equity and least inconvenient.<sup>40</sup> This is true most particularly where the inconvenience would result to the public,—an infraction of sound and acknowledged principles of national or state policy;<sup>41</sup>—a jeopardizing or sacrifice of great public interests;<sup>42</sup>—a public mischief,<sup>43</sup> and the like. Thus, it was held, that, under a statute authorizing the attachment of moneys due to a defendant in the hands of the person owing them to him, money held by a person in his official capacity as treasurer of, *e. g.*, a board of school directors, could not be attached for the satisfaction of a debt due by the school district.<sup>44</sup> “Great public inconvenience would ensue, if money could be thus arrested in the hands of officers, and they be made liable to all the delay, embarrassment and trouble that would ensue, from being stopped in the routine of their business.”<sup>45</sup> And similarly, a statute permitting attachments on judgments to be laid in the hands of any “person or persons whatever, corporate or sole,” was held not to include a municipal corporation.<sup>46</sup> It is perhaps most frequently in the construction of legislative grants to individuals and corporations that courts are called upon to protect the rights of citizens and the

<sup>39</sup> *Livingood v. Moyer*, 2 Woodw. (Pa.) 65; and see *Mohan v. Butler*, (Pa.) 3 Centr. Rep. 407.

<sup>40</sup> *Kerlin v. Bull*, 1 Dall. (Pa.) 175, 178; *Jersey Co. v. Davison*, 29 N. J. L. 415.

<sup>41</sup> See *Opin. of Justices*, 7 Mass. 523.

<sup>42</sup> *People v. Canal Comm'rs*, 4 Ill. 153.

<sup>43</sup> *Smith v. People*, 47 N. Y. 330.

<sup>44</sup> *Bulkley v. Eckert*, 3 Pa. St. 368.

<sup>45</sup> *Ibid.* The principle is there stated to extend to all other municipal and state officers entrusted

with the custody of public money, and to be analogous to that which forbids the attachment of moneys in the hands of a sheriff or prothonotary.

<sup>46</sup> *Baltimore v. Root*, 8 Md. 95. Indeed, in the construction of an act authorizing process to issue against defendants residing in foreign counties, it was said that, ordinarily, a statute, speaking in general terms of plaintiffs and defendants, applies to persons only, not to states, counties and municipal corporations, unless named: *Schuyler Co. v. Mercer Co.*, 9 Ill. 28.

public, and to apply the doctrine of the presumption against an intention to give rise to a public inconvenience. General words of incorporation in a statute are not to be construed contrary to plain reason and right;<sup>41</sup> nor acts for the accommodation of citizens or corporations, so as to affect injuriously the rights or privileges of others.<sup>42</sup> Indeed, it is said that every legislative grant is made with the implied reservation that it shall not injure others,<sup>43</sup> and the rights granted are subordinate to considerations of public safety and convenience.<sup>44</sup> Thus the grant of a right to build a bridge does not, without an express provision to that effect, give the right to obstruct navigation.<sup>45</sup> And the statutory grant of a right to lay pipes in public streets is subject to the power of the municipality to order them lowered to suit a changed grade.<sup>46</sup> As the rule is true with reference to the public and large classes of citizens, so it is true, in a more limited sense, with reference to individual rights. Some instances of its operation in this respect have been given in preceding sections.<sup>47</sup> As regards the present connection, most individual rights are capable of being compensated for if destroyed or abridged. And in general, therefore, it may be said to be a proper rule of construction that a statute is not to be so interpreted as to interfere with, or injure the rights of, persons without compensation, unless there is no escape from such construction.<sup>48</sup> Accordingly in the Lands Clauses Act, it was said that the word "hereditaments" ought to be held to include incorporeal hereditaments, "not merely on account of the generality of the words, but also because it would be expedient," easements being entitled to protection.<sup>49</sup> But it is obvious that the mere individual hardship of a case cannot always, or even ordinarily, become a feature in the

<sup>41</sup> *Matthews v. Caldwell*, 2 Disney, (O.) 279.

<sup>42</sup> See *Wales v. Stetson*, 2 Mass. 143; *Hood v. Dighton Bridge*, 3 Id. 263; *Coolidge v. Williams*, 4 Id. 140; *Perry v. Wilson*, 7 Id. 393.

<sup>43</sup> *Pittsb., etc., R. R. Co. v. S. W. Pa. Ry. Co.*, 77 Pa. St. 173, 186. And see *Com'th v. Canal Co.*, 66 Id. 41.

<sup>44</sup> *Pittsb., etc., R. R. Co. v. S. W. Pa. Ry. Co.*, supra.

<sup>45</sup> *Selman v. Wolf*, 27 Tex. 68.

<sup>46</sup> *Jersey City v. Hudson*, 13 N. J. Eq. 420.

<sup>47</sup> See, e. g., *Swift's App.*, supra, § 249.

<sup>48</sup> See *Atty.-Gen. v. Horner*, L. R. 14 Q. B. D. 257, *per* Brett, M. R.

<sup>49</sup> *Great West. Ry. Co. v. Swindon, etc., Ry. Co.*, L. R. 9 App. Cas. 787, *per* Lord Bramwell, at pp. 808-809.

construction of an act."<sup>50</sup> And, in general, the argument from inconvenience must be cautiously applied. It is said that it can never have weight except in doubtful cases," and that it is a most dangerous doctrine;<sup>51</sup> though if, by reading an enactment in its ordinary sense, there results an inconvenience not only great, but what may be called an absurd inconvenience, whereas, if read in a manner in which, whilst it is not its ordinary sense, it is yet capable of being read, it leads to no inconvenience at all, this, it is admitted, would constitute a reason for not reading it according to its ordinary grammatical meaning.<sup>52</sup>]

§ 252. A construction which facilitated the evasion of a statute would, on similar grounds of inconvenience, be avoided. Thus, an Act which forbade an innkeeper to suffer any gaming "in his house or premises," was construed as extending to gaming by himself and his personal friends in his private rooms in the licensed premises; for a construction which limited the prohibition to the guests in the public rooms would have opened the door to collusion and evasion (*a*).

And yet, a construction facilitating evasion, even to the extent of defrauding the revenue, may be justified and required by considerations of convenience, as in the case of Stamp Acts; where the question whether the document is sufficiently stamped depends solely on what appears on the face of the document, to the exclusion of all extrinsic evidence to prove the contrary; for, to admit evidence to invalidate it, would lead to the intolerable inconvenience of holding a collateral inquiry, to the interruption of the trial of the cause in which the paper was tendered (*b*).

<sup>50</sup> See post, § 266.

<sup>51</sup> *Gore v. Brazier*, 3 Mass. 523. See ante, § 263.

<sup>52</sup> *R. v. Tonbridge Overseers*, L. R. 13 Q. B. D. 342.

<sup>53</sup> *Ib.*, per Brett, M. R. See for an instance of the application of the argument from inconvenience to construction of an obscure act, *Duquesne Sav. B'k's App.*, 96 Pa. St. 298.

(*a*) *Patten v. Rhymer*, 3 E. & E. 1, 29 L. J. 189; *Corbet v. Haigh*,

5 C. P. D. 50; and see per Brett, L. J., in *Hes v. West Ham Union*, 8 Q. B. D. 69, 51 L. J. 24. Comp. *Brigden v. Heighes*, 1 Q. B. D. 330; *Tassell v. Ovenden*, 2 Id. 383; *Lester v. Torrens*, Id. 403; *Bosley v. Davies*, 1 Id. 84.

(*b*) *Whistler v. Forster*, 14 C. B. N. S. 248; *Austin v. Bunyard*, 6 B. & S. 687; *Gatty v. Fry*, 2 Ex. D. 265; comp. *Clarke v. Roche*, 47 L. J. Q. B. 141.

§ 253. **Joint and Several Offences and Penalties. Complex Act.**—Acts which impose a pecuniary penalty have sometimes given rise to a question, when there were two or more offenders, whether one joint or several separate penalties were intended; and this, where the Act has left it open to doubt, has been said to depend on whether the offence was in its nature joint or several. When the offence is one in which every participator is justly punishable in proportion to the part which he took in it, the inference would obviously be that a separate penalty on each was intended. In the offence of assaulting and resisting a custom-house officer, one may resist, another molest, a third run away with the goods; all are distinct acts, each a separate offence, and each offender would be liable for his own separate offence (*a*). So, under the Toleration Act, which enacts that if any person or persons maliciously disturb a congregation, such “person or persons” shall, on conviction of “the said offence,” be liable to a penalty of 20*l.*, it was held that every person engaged in such a disturbance would be liable to a separate penalty (*b*).

So, where two men were convicted of an assault and sentenced to pay one penalty, under the 9 Geo. 4, c. 31, the conviction was quashed; because a penalty ought to have been imposed on each offender severally, the offence being in its nature several (*c*). And under the 1 & 2 Will. 4, c. 32, s. 30, which enacts that if “any person” shall trespass in the daytime on land in search of game, “such persons” shall be liable to a penalty of two pounds, every offender is liable to a separate penalty (*d*).

§ 254. But it has been said that where the offence is in its nature single,—[and if the statute contemplates one offence, in the commission of which two classes of offenders may be engaged, an offence by both is one and entire“]—and is punished by a pecuniary penalty, only one penalty

(*a*) *Per* Lord Mansfield in *R. v. Clarke*, Cowp. 610. [See to same effect: *Sedgw.*, at p. 79, citing, in addition, *Palmer v. Conly*, 4 Denio, (N. Y.) 376; *Conley v. Palmer*, 2 Coms. (N. Y.) 182.]

(*b*) *R. v. Hube*, 5 T. R. 542.

(*c*) *Morgan v. Brown*, 4 A. & E. 515. See also *R. v. Martin*, 5 Q. B. 591.

(*d*) *Mayhew v. Wardley*, 14 C. B. N. S. 550.

<sup>54</sup> *People v. Kobb*, 3 Abb. App. Dec. (N. Y.) 529.

can be imposed on all the offenders jointly; that if it is the offence, and not the offender, that is visited with punishment by the statute, only one penalty is incurred, however large may be the number of persons who incurred it.<sup>55</sup> Thus [an act imposing a penalty on managers of theatrical exhibitions without license, and on the owner, etc., of the buildings let therefor, created but one offence, and but a single penalty, and a complaint against both for the penalty stated but one cause of action.<sup>56</sup> Thus, too,] under the statute of Anne, which enacted that if any unqualified "person or persons" kept or used hounds for destroying game, "the person or persons" so offending should forfeit five pounds, it was held that to keep or use a greyhound for such a purpose was punishable by one penalty only, whether the dog was kept or used by one or by several persons. Only one dog was kept, it was said, and only one penalty, falling on all the offenders jointly, was imposable (a). The decision has been perhaps better defended on the ground that the Act, in speaking of "persons" in the plural, and providing that for such "offence," in the singular, they should pay five potnds, and not five pounds "each," one joint offence and penalty were contemplated (b). In an old case cited in support of this construction, it was held that the statute 1 & 2 Phil. & M. c. 12, which prohibited the impounding of a distress in a wrong place, "upon pain every person offending should forfeit to the party grieved for every such offence" a hundred shillings and treble damages, gave only one penalty against three persons (c). But although this decision is said to have been based on the ground that the offence was one only, and joint, the penalty was recoverable only by the party grieved, and was consequently to be regarded as a compensation to him, not as a punishment on

<sup>55</sup> See to same effect, Sedgw., at p. 79, citing *Warren v. Doolittle*, 5 Cow. (N. Y.) 678; *Palmer v. Conly*, supra; *Conley v. Palmer*, supra.

<sup>56</sup> *People v. Kobb*, supra.

(a) *Hardyman v. Whitaker*, 2 East, 573n.; *R. v. Matthews*, 10

Mod. 26; *R. v. Bleasdale*, 4 T. R. 809.

(b) *Per Alderson, B.*, in *R. v. Dean*, 12 M. & W. 42.

(c) *Partridge v. Naylor*, Cro. Eliz. 480, cited in *R. v. Clarke*, Cowp. 610; *R. v. King*, 1 Salk. 182.

the offenders (*a*). Viewed in this light, it is clear that only one penalty could be recovered; for the injury was the same, whether it was done by one or by several persons; and it could hardly have been intended that the pecuniary compensation for a wrong should vary in amount with the number of persons concerned in doing it.

In referring to cases of this kind, Lord Mansfield observed that if partridges were netted by night, two or three or more men might draw the net, but still it constituted but one offence; and that killing a hare was but one offence, whether one killed it or twenty, and that it could not be killed more than once (*b*). But however pertinent such considerations might be in measuring the damage done to the owner of the game, they seem less applicable to the question of punishing, on public grounds, a breach of the law. The question whether the offence was joint or several evidently arose, not from the nature of the offence, but from the nature of the penalty. If the penalty had been corporal instead of pecuniary, the distinction between joint and several offences could hardly have occurred; for it would have been found difficult to apply the rule of one joint penalty to two offenders sentenced to five weeks' imprisonment or twenty-five lashes. It would seem that the question whether the penalty is to be understood as separate or joint, where the Act is not explicit, would be better governed by the consideration whether the penalty was intended as compensation for a private wrong, or as a punishment for an offence against public justice.<sup>57</sup>

§ 255. [Similarly, where the penalty is imposed upon a complex act, or several acts, constituting, in fact, but a single offence. Thus, where an act of Congress imposed a penalty upon any person using "any still or stills" in distilling spirituous liquors, without having a license therefor, it was held that the use of two stills subjected such a person to but a single, not the double, penalty, the use of the still or stills being but a single act, for which

(*a*) See *ex. gr.* *Stevens v. Jeacocke*, 1 Q. B. 731.

(*b*) In *R. v. Clarke*, Cowp. 612.

<sup>57</sup> See post, § 259.



one single penalty only could be recovered.<sup>58</sup> So, where an act provided that a person selling liquors at retail without license, or selling such to be drunk at his house without entering into a recognizance prescribed, should, for each offence, forfeit \$25, it was held that only one penalty of \$25 could be incurred for each of these two offences, though it was proved, *e. g.*, that the offender had sold liquor to five several persons at five several times.<sup>59</sup> So there can be but one violation by the same person on the same day of an act prohibiting and punishing the "performing any worldly employment or business whatsoever" on Sunday.<sup>60</sup>

§ 256. It is hardly necessary to add that all such considerations are immaterial where the language of the Act is not open to doubt. Thus, where it was enacted that "every person" who assisted in unshipping or concealing prohibited goods should forfeit treble their value or 100% at the election of the Commissioners of Customs, it was held that every person concerned in the offence was liable to a separate penalty (*a*); although undoubtedly the offence was as joint in its nature as in the case of the wrongful removal of the distress (*b*). [And so as to the severableness of the offences. Thus, where an act which made brokers and private bankers failing to make a report, required by the second section, of their names, place of business and capital employed, and an annual return, required by the first section, of the profits of their business, liable to a penalty "for every such neglect or refusal," it was held that separate penalties were to be imposed upon the neglect to make the report, and upon the neglect to make the return. "Each is indispensable—the report, that it may be known to the Commonwealth who is liable to taxation; the return, that the means of assessing the tax may be furnished. The report is once for all time the party may continue in business; the returns annually until he ceases. It

<sup>58</sup> *Buckwalter v. U. S.*, 11 Serg. & R. (Pa.) 193.

<sup>59</sup> *Washburn v. McInroy*, 7 Johns. (N. Y.) 134.

<sup>60</sup> *Crepps v. Durden*, 2 Cowp. 640; *Friedeborn v. Com'th*, 113 Pa. St. 242, overruling *Duncan v.*

*Com'th*, 2 Pears. (Pa.) 213; *Reiff v. Com'th*, 42 Leg. Int. (Pa.) 90.

(*a*) 3 & 4 W. 4, c. 63; *R. v. Dean*, 12 M. & W. 140.

(*b*) *Partridge v. Naylor*, Cro. Eliz. 480.

is clear that the offences being different in kind, independent in act, and distinct in time, each is liable to punishment. When the Legislature, therefore, said, every such neglect or refusal should be the subject of a penalty, it becomes very plain it did not refer to a joint neglect of several acts impossible of simultaneous performance. Had the word 'every' been omitted, the language might have been dubious; but with it before us, as a part of the very letter of the act, we are admonished by the reference ['such'] to resort to the separate sections to ascertain the neglect or refusal referred to, and thus compelled to give the distributive word 'every' a reference to each: *reddendum singula singulis*.<sup>61</sup>

§ 257. **Actions for Penalty where Several are Aggrieved.**—[The exact converse of the question above discussed arises where the statute imposes a penalty for an offence, and gives a right of action for the recovery thereof to several persons affected by its commission. Has each of these persons a right to sue for the same? or, in other words, may the penalty be doubled, tripled, etc., according to the number of the persons affected? It would seem that the solution of the question is to be governed also "by the consideration whether the penalty was intended as compensation for a private wrong, or as a punishment for an offence" against the public,<sup>62</sup> but with the opposite result. Thus, where an act provided, that if any justice of the peace should join in marriage "any person or persons," without previous publication as required by the act, he should, "for every such offence," forfeit the sum of fifty pounds, to be recovered "by the person or persons grieved, if they will sue for the same,"—the "persons grieved" being the parents of the parties joined in marriage. It was held that only one penalty of fifty pounds could be recovered against a justice for joining two persons in marriage, and that a recovery by the parent of one of the parties barred an action for it by the parent of the other." "It appears to me," said Mr. Chief

<sup>61</sup> *Com'th v. Cooke*, 50 Pa. St. 201, 207-8.

<sup>62</sup> See ante, § 255.

<sup>63</sup> *Hill v. Williams*, 14 Serg. &

R. (Pa.) 287; *Burns v. Bryan*, 1 Pitts. (Pa.) 191, unless the prior judgment was the result of collusion: *Ibid*.

Justice Tilghman,<sup>64</sup> "that the act of the justice in marrying any persons . . . is the offence on which the penalty is inflicted, and that it is but one offence, although two persons are joined in marriage, and the parents of each may be grieved by it. The object of the law was not so much to make a compensation to the injured parents . . . as to deter all persons from being accessory to these clandestine marriages . . . Where the parents of both man and woman are grieved by the marriage, it is much more reasonable to say, that both may join in the action and share the penalty, than that the justice shall pay a hundred pounds where the law has said he shall pay fifty pounds."<sup>65</sup>

§ 258. **Presumption against Injustice.**—Whenever the language admits of two constructions, it is obvious that the more reasonable of the two should be adopted as that which the Legislature intended (*a*). [If the words of a statute, though capable of an interpretation which would work manifest injustice, can possibly, within the bounds of grammatical construction and reasonable interpretation, be otherwise construed, the court ought not to attribute to the Legislature an intention to do what is a clear, manifest and gross injustice.<sup>66</sup> On the contrary, the presumption always is, where the design of an act is not plainly apparent, that the Legislature intended the most reasonable and beneficial interpretation to be placed upon it.<sup>67</sup> It is obvious that the administration of justice requires something more than the mere application of the letter of the law, designed for some particular class of ordinary cases, to all others, however modified by accident or withdrawn by extraordinary circum-

<sup>64</sup> In *Hill v. Williams*, supra, at p. 288.

<sup>65</sup> The person first bringing an action for a statutory penalty acquires a right to it which no other common informer can divest; so that, while the former action is pending, a subsequent writ is bad ab initio: *Dozier v. Williams*, 47 Miss. 605. But, until reduced to judgment, there is no vested right in the penalty in any one: *State v. Youmans*, 5 Ind. 280.

(*a*) *Per* Lord Campbell, in *R. v. Skeen*, Bell, 97, 28 L. J. M. C. 98,

and *R. v. Land Tax Com.*, 2 E. & B. 716; *per* Keating, J., in *Boon v. Howard*, L. R. 9 C. P. 308; *per* Brett, L. J., in *R. v. Monck*, 2 Q. B. D. 555; *Smith v. G. W. R. Co.*, 3 App. 165; *per* Lord Blackburn, in *Roths v. Kirkaldy Commissioners*, 7 App. 702.

<sup>66</sup> *Plumstead B'd of Works v. Spackman*, L. R. 13 Q. B. D. 878, *per* Brett, M. R.

<sup>67</sup> *Richards v. Dagget*, 4 Mass. 534, 537; *Somerset v. Dighton*, 12 Id. 383, 385.

stances from the spirit of its enactment." It follows that "general terms should be so limited in their application as not to lead to injustice, oppression, or an absurd consequence." It will always, therefore, be presumed that the Legislature intended exceptions to its language which would avoid results of this character. The reason of the law in such cases should prevail over its letter."<sup>66</sup>] Thus, where a by-law authorized the Poulterers' Company to fine "all" poulterers in London or "within seven miles round," who refused to be admitted into their company, it was held that, inasmuch as no poulter could legally belong to the company who was not also a freeman of the City, the by-law was to be construed as limited to those poulterers who were also freemen; to avoid the injustice of punishing men for refusing to enter into a company to which they could not legally belong (a). The Merchant Shipping Act of 1873, which enacts that if, "in any case of collision," it is proved that any of the regulations for preventing collisions had been infringed, the ship which infringed them shall be deemed in fault, unless the circumstances justified it, would apply only to cases where the infringement could have contributed to the collision, but not where it could not possibly have done so (b); just as an Act which imposes a penalty for piloting a ship down the Thames without license, is evidently limited to piloting on a voyage, and would not apply to a person in charge of a ship when merely shifting from one wharf to another to unload the cargo (c). An Act which provided that no writ or process should issue for anything done under it but after a month's notice, would not apply to proceedings for an injunction; for if it did, the wrong might be irremediable, which could not be intended (d). Besides, the object of the provision was only to give the defendant

<sup>66</sup> Clark's Succession, 11 La. An. 124.

<sup>67</sup> Or to absurdity, injustice, contradiction, or unreason, all of which should be, if possible, avoided in the construction: Hunt v. R. R. Co. (Ind.) 11 West. Rep. 107; Sawyer v. State (Ohio) Ib. 262.

<sup>70</sup> U. S. v. Kirby, 7 Wall. 482, 486-7; and see to similar effect: Reiche v. Smythe, 13 Id. 162;

Exp. Ellis, 11 Cal. 222; Bish., Wr. L., § 93.

(a) Poulterers' Co. v. Phillips, 6 Bing. N. C. 314; Dimsdale v. Saddler's Co., 32 L. J. Q. B. 337.

(b) 36 & 37 Vict. c. 85, s. 17. The Englishman, 3 P. D. 18; The Magnet, The Fanny Carvill, L. R. 4 A. & E. 417, 44 L. J. Adm. 34

(c) R. v. Lambe, 5 T. R. 76.

(d) Atty.-Genl. v. Hackney Board, L. R. 20 Eq. 626.

time to make amends before he was sued with that object (a). The 12 & 13 Vict. c. 92, s. 5, which requires "every person," who impounds an animal, or causes it to be impounded or confined, to supply it with food, would not apply to the keeper of the pound (b).

The enactment in the Licensing Act of 1872, that "every person found drunk on licensed premises" should be liable to a penalty, though literally wide enough to include the publican who had got drunk anywhere, and was found in that condition in his bed after the house was closed, would be construed, according to the manifest object of the Act, as confined to persons found on the premises while using it as a house for public resort (c).

§ 259. A statute which enacts that a person who has been convicted by justices of an assault, and has suffered the punishment awarded for it, shall be released from all other proceedings "for the same cause," would not be construed as exempting him from prosecution for manslaughter, if the party assaulted afterwards died from the effects of the assault; such a construction would defeat the ends of justice (d). An Act which imposed a penalty on any sheriff or bailiff who carried a person arrested for debt to prison for twenty-four hours, though it might render the former liable for the act of the latter, his servant, as well as for his own, would not be construed to admit of his being sued, after the penalty had been recovered from the bailiff; for this would be to give the plaintiff a second penalty for the same act, after he had been compensated by the first; and would, indeed, make the bailiff liable to pay twice, as he would be bound by the usual bond to indemnify the sheriff (e).

An Act (5 & 6 Vict. c. 39, s. 6) which protected a fraudulent agent from conviction, if he "disclosed" his offence on

(a) *Flower v. Lord Leyton*, 5 Ch. D. 347.

(b) *Dargan v. Davies*, 2 Q. B. D. 118.

(c) 33 & 34 Vict. c. 29; *Lester v. Torrens*, 2 Q. B. D. 403. See *Warden v. Tye*, 2 C. P. D. 74. *Comp. Patten v. Rhymmer*, sup., § 252. See another illustration in

*Ancketill v. Baylis*, 52 L. J. Q. B. 104.

(d) *R. v. Morris*, L. R. 1 C. C. 90. ["Same offence" means *same* both in law and in fact: *U. S. v. Cashiel*, 1 *Hugh*. 552.]

(e) *Peshall v. Layton*, 2 T. R. 712. See *Wright v. London Omnibus Co.*, 2 Q. B. D. 271. [See ante, § 255.]

oath, in any examination in bankruptcy, was held not to include a confession made there after commitment by a magistrate, which was in substance only a repetition of the facts proved before the latter; on the ground that it would have been absurd and mischievous to enable a man to provide an indemnity for himself, by simply making a statement of facts already known and provable aliunde, and not in any way advancing either civil or criminal justice by the alleged "disclosure" (a).

§ 260. Although there is no positive rule of law against a retrospective rate (b), enactments which authorize the imposition of rates and similar burdens on the inhabitants of a locality have been repeatedly held not to authorize, without express words, a retrospective charge; on the ground of the injustice of throwing on one set of persons a burden which ought to have been borne by another at a former period (c). And where the Act makes the occupier rateable at what a tenant from year to year would give for it, it would be understood, where the property was subject by law to restrictions which prevented the occupier from obtaining the full value, that the hypothetical tenant was similarly subject to them (d).

An Act which prohibits the negligent use of furnaces in such a manner as not to make them consume smoke, "as far as possible," means only so far as the smoke can be consumed

(a) *R. v. Skeen*, Bell, 97, 28 L. J. M. C. 91. So held by nine judges against five. See *Lewes v. Barnett*, 6 Ch. D. 252, 47 L. J. 144.

(b) See *Harrison v. Stickney*, 2 H. L. 108; *R. v. Carpenter*, 6 A. & E. 794; *R. v. Read*, 13 Q. B. 524; *Jones v. Johnson*, 7 Ex. 452, 21 L. J. M. C. 102; *R. v. Maidenhead*, 8 Q. B. D. 339, 51 L. J. 209. [See *New Engl., etc., Co. v. Montgomery Co.*, 81 Ala. 110, where it is said that the Legislature may impose taxes, having a retroactive operation, and may take the profits or income of a business for a preceding year as the measure of assessment: but that such an intention is not to be presumed in the absence of clear and indisputable expressions.]

(c) *Tawny's Case*, 2 Salk. 531;

*Newton v. Young*, 1 B. & P. N. R. 187; *R. v. Maulden*, 8 B. & C. 78; *R. v. Dursley*, 5 A. & E. 10; *Waddington v. London Union*, 28 L. J. M. C. 103; *R. v. Stretfield*, 32 L. J. M. C. 236; *Bradford Union v. Wilts*, L. R. 3 Q. B. D. 604; *R. v. Wigan*, 1 App. 611. [Similarly, although there is nothing to prevent the Legislature, if it so chooses, to impose double taxation, it is said, in the *Druggists' Case*, 85 Tenn. 449, to be safe, in the construction of revenue laws, to presume against an intent to impose double taxation on the same business or privilege. In *Hann., etc., R. R. Co. v. Shacklett*, 30 Mo. 550, the idea of double taxation is treated as an absurdity.]

(d) *Worcester v. Droitchich*, 2 Ex. D. 49.

consistently with the due carrying on of the business for which the furnace is used, and not as far as it is physically possible to consume it, without regard to the detriment which the business carried on would suffer; the Act not having expressed any intention to interfere with it (a). The Carrier's Act (11 Geo. 4 & 1 Will. 4, c. 68), which exempts carriers from responsibility for the loss of certain articles worth more than ten pounds, unless their nature and value are declared, but enacts also that the Act shall not affect any special contract of carriage, was construed not literally, as making the Act inapplicable whenever any special contract was made, but only as not affecting any special contract inconsistent with the exemption provided by the Act (b).

§ 261. [So, where the terms of an act imposing joint and several liability for the debts of a corporation upon its trustees, as the consequence of their neglect to make and publish certain annual returns required of them, were broad enough to include debts of the company to an individual trustee, the injustice resulting from such a construction, with the effect, manifestly improper, of allowing one trustee to avail himself of the default of the board, of which he was an integral part, to establish a right of action in his favor against his fellows, induced its rejection.<sup>71</sup> Under an act giving to city councils the power to make and establish rules and regulations for the better regulation of pit or bay windows, whilst it authorizes them to ordain general rules upon the subject, does not permit any special legislation thereon, or the granting of any special licenses to individuals to erect and maintain bay or oriel windows in the public highway beyond the established building line.<sup>72</sup> Under an act which grades the salaries of certain county officers according to the population of a county, an officer, in order to be entitled to a certain salary claimed by him, must show that

(a) *Cooper v. Wolley*, L. R. 2 Ex. 88.

(b) *Baxendale v. The G. E. R. Co.*, L. R. 4 Q. B. 245. The ordinary stipulation in a bill of lading, excepting liability for breakage, leakage and damage, would be similarly limited in construction,

as not extending to any such injury caused by the shipowner or his servants: *Phillips v. Clark*, 2 C. B. N. S. 156; *Czech v. Gen. Steam Nav. Co.*, L. R. 3 C. P. 14.

<sup>71</sup> *Briggs v. Easterly*, 62 Barb. (N. Y.) 51, post, § 267.

<sup>72</sup> *Reimer's App.*, 100 Pa. St. 182

the number of inhabitants in the county, at the time he entered upon his office, was such as to class it as a county in which the salary asked by him is, by the act, payable therefor." Obviously, "whatever the population may previously have been, or what it may thereafter become, does not control the case."<sup>74</sup> Hence, where, by the United States decennial census of 1870,<sup>75</sup> a county contained 160,915 inhabitants, and in 1878 a part of its territory was separated from it to erect a new territory, leaving, according to the census, in the remaining portion less than 150,000 inhabitants, and it was shown that the new territory, in that year, contained 80,000 inhabitants, an officer of the old county, entering upon his office in 1880, was held not to be entitled to the salary appointed for such officers in counties having "less than 250,000 and over 150,000 inhabitants."<sup>76</sup> The object of an exemption from execution, ordained by an act, of tools, etc., being to prevent persons in financial distress from being deprived of the means of earning a livelihood, it was held to contemplate, as a probable contingency, that the loss of all property not so exempt might cause at least a temporary cessation of business and employment, and such stoppage, therefore, was held not to forfeit the exemption.<sup>77</sup> Under an act requiring railroad companies to erect and maintain fences along their lines, and for failure to do so making them liable for all damages resulting therefrom, it was held that a railroad company was not liable for injuries resulting from a casual defect in the fencing, as though it were an insurer, but that the question of its liability, in such cases, was a question of neglect of duty.<sup>78</sup> It has been seen<sup>79</sup> how, to obviate unreasonable and unjust results, the words "owner," "occupier," and the like, have been given a construction greatly departing from their usual and ordinary significations, and<sup>80</sup> that a construction of a statute

<sup>73</sup> *Monroe v. Luzerne Co.*, 103 Pa. St. 278.

<sup>74</sup> *Ib.*, at p. 281.

<sup>75</sup> And in the absence of evidence, an increase of population between its date and that of the beginning of the officer's term, will

not be assumed: *Ibid.*

<sup>76</sup> *Ibid.*

<sup>77</sup> *Harris v. Haines*, 30 Mich. 140.

<sup>78</sup> *Murray v. R. R. Co.*, 3 Abb. App. Dec. (N. Y.) 339.

<sup>79</sup> *Ante*, §§ 95-96.

<sup>80</sup> *Ante*, § 130 note.



which would make a man guilty, regardless of his intent, should not, unless unavoidable, be adopted."

§ 262. **Summary Proceedings.**—[It has been said that the law abhors all *ex parte* proceedings without notice," and that, consequently, to take a man's property and assess his damages, without notice to him, is repugnant to every principle of justice." Accordingly, it is laid down as a rule, that, wherever the Legislature authorizes, and precribes a mode for, the taking of property, it is to be presumed that notice is to be given to the parties in interest;" and, as a necessary corollary of this presumption, that, where the statute unequivocally dispenses with such notice, it is to be strictly construed;" as is also a statute permitting constructive service of notice, etc."]

§ 263. **Limits of Effect of Presumption against Injustice.**—It is to be borne in mind that the injustice and hardship which the Legislature is presumed not to intend is not merely such as may occur in individual and exceptional cases only." Laws are made *ad ea quæ frequentius accidunt* (a); and individual hardship not unfrequently results from enactments of general advantage. The argument of hardship has been said to be always a dangerous one to listen to (b). It is apt to intro-

<sup>61</sup> *Bradley v. People*, 8 Col. 599. See another instance of a construction against unreason and injustice, ante, § 142, *Philadelphia v. Pass. Ry. Co.*, 102 Pa. St. 190. See, also, *Marsh v. Nelson*, 101 Pa. St. 51, 55, where it was said: "If it was the design to do away with the distinction between seated and unseated lands, it is likely that the right of redemption would have been placed upon the same footing."

<sup>62</sup> *Neeld's Road*, 1 Pa. St. 353, 355.

<sup>63</sup> *Ibid.*

<sup>64</sup> *Boonville v. Ormrod*, 26 Mo. 193; *Wickham v. Page*, 49 Id. 526. That a statute will not be construed to authorize judicial proceedings in general, without notice to the party to be affected by them, see *Bish., Wr. L.*, §§ 25, 141, and cases there cited.

<sup>65</sup> See ante, § 158, and post, § 334. Upon this principle, an

act of the California Legislature, authorizing attachments against boats and vessels "used in navigating the waters of the state," was held not to include a vessel belonging to New York, intended for trade between New York and China, and navigating the waters of California only to the extent of sailing from the ocean to San Francisco: *Souter v. The Sea Witch*, 1 Cal. 162; and see *Tucker v. The Sacramento*, Id. 403; *Ray v. The Henry Harbeck*, Id. 451.

<sup>66</sup> *Stewart v. Stringer*, 41 Mo. 400; *Gray v. Larrimore*, 2 Abb. U. S. 542. And so as to statutes allowing summary proceedings to obtain possession of land: *Baldwin v. Cooley*, 1 Rich. N. S. (S. C.) 256.

<sup>67</sup> See ante, § 251.

(a) Dig. 1. 9. 3—10. [2 Inst. 237.]

(b) *Per Cur.* in *Munro v. Butt*, 8 E. & B. 754. [Ante, § 251.]

duce bad law (*a*); and has occasionally led to the erroneous interpretation of statutes (*b*). Courts ought not to be influenced or governed by any notions of hardship (*c*). They must look at hardships in the face rather than break down the rules of law (*d*); and if, in all cases of ordinary occurrence, the law, in its natural construction, is not inconsistent, or unreasonable, or unjust, that construction is not to be departed from merely because it may operate with hardship or injustice in some particular case (*e*).

§ 264. **Presumption against Absurdity.**—[The presumption against absurdity in the provision of a legislative enactment is probably a more powerful guide to its construction, than even the presumption against unreason, inconvenience, or injustice. The Legislature may be supposed to intend all of these; but it can scarcely be supposed to intend its own

(*a*) *Per* Rolfe, B., in *Winterbottom v. Wright*, 10 M. & W. 116; *Brand v. Hammersmith R. Co.*, L. R. 2 Q. B. 241; *Adams v. Graham*, 33 L. J. Q. B. 71.

(*b*) *Comp. ex. gr. Perry v. Skinner*, 2 M. & W. 471, with *R. v. Mill*, 10 C. B. 379, 1 L. M. & P. 695; and *R. v. Shiles*, 1 Q. B. 919, and *Welch v. Nash*, 8 East, 394, with *R. v. Phillips*, L. R. 1 Q. B. 648. See *Re Palmer*, 21 Ch. D. 47.

(*c*) *Per* Lord Abinger, in *Rhodes v. Smethurst*, 4 M. & W. 63.

(*d*) *Per* Lord Eldon, in the *Berkeley Peerage*, 4 Camp. 419, and in *Jesson v. Wright*, 2 Bligh, 55; *per* Jessel, M. R., in *Ford v. Kettle*, 9 Ch. D. 439, 51 L. J. 559, and *Kirk v. Todd*, 21 Ch. D. 488.

(*e*) See *Co. Litt.* 97b, 152b; *per* Parke, B., in *Miller v. Salomons*, 21 L. J. 192, and *Williams v. Roberts*, 7 Ex. 628, 22 L. J. 64. [The maxim *ad ea quæ frequentius, etc.*, above referred to, is used also to express a very different idea appropriate to the present subject. "The operation of statutes is generally confined to things which occur most frequently, and is not extended to everything that may possibly happen. *Ad ea quæ frequentius accidunt adaptantur jura.* 'In construing a statute we must not look to cases of very rare

and singular occurrence, but to those of every day's experience:' *Hyde v. Johnson*, 2 Bing. N. C., at p. 780, *per* Tindal, C. J. But this rule must not be carried so far as to defeat the real object of any statute, either by the omission of cases which come within its language, or the extension of such language to cases which it cannot fairly include. The rule and its limits are thus stated in an early case: 'When the words of a law extend not to an inconvenience rarely happening, and do to those which often happen, it is good reason not to strain the words further than they reach by saying it is *casus omissus*, and that the law intended *quæ frequentius accidunt*. But it is no reason when the words of a law do enough extend to an inconvenience seldom happening that they should not extend to it as well as if it happened more frequently because it happened but seldom:' *Bole v. Horton, Vaughan*, at p. 373. . . 'We cannot agree that the smallness of the evil to be remedied, if the words are understood in their strict and proper sense, is a good reason for reading them in another:' *Dimes v. Grand Junction Canal Co.*, 9 Q. B., at p. 514:" *Willb.*, Stat. L., pp. 169, 170.

stultification. Accordingly, it has been said, that, when to follow the words of an enactment would lead to an absurdity as its consequences, that constitutes sufficient authority to the interpreter to depart from them." No doubt, where a statute declares "all the officers," etc., abolished, a departure from such language to the extent of reading "officers" as "offices" held by the officers designated, is amply warranted." And where the close interpretation of a loosely amended enactment would lead to consequences so dangerous and absurd that they could never have been intended, the court may draw its construction from other analogous provisions, with the effect of supplying an omission in the act under construction." In general, it may safely be said, that where words in a statute are susceptible of two constructions, of which one will lead to an absurdity, the other not, the latter is to be adopted," though it be not the literal construction," but a liberal one." For instance, an act punishing the "willfully destroying" a fence, would be held to apply only to such acts of destruction as were trespasses." In such cases, the apparent intent of the statute must prevail over a literal construction of its terms."

§ 265. *Construction ut magis valeat, etc.*—[There is the strongest kind of presumption against the existence of that species of absurdity in the intention of the Legislature which would consist in a design to defeat its own object. Yet it not infrequently occurs that one portion or provision of a statute, if literally or even naturally construed, would practically nullify the whole, or some material portion, of the remainder of the act, with the effect of defeating its obvious purpose. In cases of this description, it is a settled rule of construction, flowing from the obvious absurdity of any other, that such an interpretation shall, if possible, be placed upon the statute, *ut magis valeat quam pereat*.

<sup>88</sup> *Perry Co. v. Jefferson Co.*, 94 Ill. 214.

<sup>89</sup> *Ohio v. Covington*, 29 Ohio St. 102, 117.

<sup>90</sup> *Foley v. Bourg*, 10 La. An. 129.

<sup>91</sup> *Philadelphia v. Pass. Ry. Co.*, 102 Pa. St. 190, 197; *Jeffersonville v. Weems*, 5 Ind. 547; *Bish., Wr. L.*,

§§ 81, 200, and case there cited.

<sup>92</sup> See *Ibid.*; *People v. Admire*, 39 Ill. 251; *State v. Clark*, 29 N. J. L. 196; *Henry v. Tilson*, 17 Vt. 479.

<sup>93</sup> *Gilkey v. Cook*, 60 Wis. 133.

<sup>94</sup> *State v. Clark*, *supra*.

<sup>95</sup> *Chandler v. Lee*, 1 Idaho, N S. 349.

[It has been seen that every clause and word of a statute is presumed to have been intended to have some force and effect." A fortiori, the language of a statute is to be given such a construction as will give the act some force and effect." "It is a cardinal rule, that all statutes are to be so construed as to sustain, rather than ignore, them ; to give them operation, if the language will permit, instead of treating them as meaningless." But beyond this, "the duty of the court, being satisfied of the intention of the Legislature, clearly expressed in a constitutional enactment, is to give effect to that intention, and not to defeat it by adhering too rigidly to the mere letter of the statute, or to technical rules of construction." Hence, in the construction of statutes an interpretation is never to be adopted that would defeat the purpose of the enactment, if any other reasonable construction can be found which its language will fairly bear<sup>100</sup>—and this applies as well to penal as to other statutes.<sup>101</sup> Thus, an appropriation of \$200,000 for the erection of buildings authorized which must cost three times that amount, would not be construed as a limitation upon the expenditure ; for that would defeat the object of the law :<sup>102</sup> and a declaration, in the last section of an act, that all acts and parts of acts relating to the subject-matter thereof should be repealed from and after the time when the act should take effect, would not be construed as a repeal of that act, but of all others upon the same subject-matter.<sup>103</sup> For this purpose, wrong figures and dates have been read as corrected<sup>104</sup>—words have been treated as surplusage<sup>105</sup>—in sentences elliptically construed, words evidently necessary to complete the sense have been

<sup>98</sup> Op. of Justices, 22 Pick. 571 ; ante, § 23.

<sup>99</sup> *Nichols v. Halliday*, 27 Wis. 406 ; *Winter v. Jones*, 10 Ga. 190 ; *Simmons v. Powder Works*, 7 Col. 285 ; *Bish., Wr. L.*, § 82, cit. *Nichols v. Halliday*, supra ; *Bailey v. Com'th.*, 11 Bush (Ky.) 688 ; *Manis v. State*, 3 Heisk. (Tenn.) 315, 316.

<sup>100</sup> *Howard Ass'n's App.*, 70 Pa. St. 344, 346. In this case, the principle was applied so as to construe two acts in *pari materia* as

both in force, rather than as the last repealing the first.

<sup>101</sup> *Oates v. Nat'l B'k*, 100 U. S. 239.

<sup>102</sup> *The Emily and The Caroline*, 9 Wheat. 381 ; *State v. Blair*, 32 Ind. 313.

<sup>103</sup> *The Emily*, etc., supra.

<sup>104</sup> *Cook v. Comm'rs*, 6 McLean. 112. And see *State v. Board of Publ. Works*, 36 Ohio St. 499.

<sup>105</sup> *State v. Stinson*, 17 Me. 154.

<sup>106</sup> See post, § 319.

<sup>107</sup> See post, § 301.

supplied<sup>106</sup>—and in a statute intended to confer jurisdiction, the word “not,” inserted, by mistake, in such a way as to nullify the intention of the Legislature, was ignored in the construction.<sup>107</sup>

§ 266. **Caution as to Application of Presumption against Unreason, etc.**—[But with reference to absurdities of this class, as well as to inconsistencies, unreasonableness, inconvenience and injustice, the rule that controls all is, “that we are to take the whole statute together and construe it all together, giving the words their ordinary significance, unless when so applied they produce an inconsistency, or an absurdity, or inconvenience so great as to convince the court that the intention could not have been to use them in their ordinary signification, and to justify the court in putting on them some other signification which, though less proper, is one which the court thinks the words will bear.”<sup>108</sup> And “the absurdity, injustice, inconsistency, inconvenience and incongruity, which are, if possible, to be avoided, must be such as an examination of the statute itself and a comparison of all its parts would disclose;”<sup>109</sup> and not such merely as arise from local circumstances which may never have been known to the Legislature.<sup>110</sup> Nor can the construction contravene the language of the act, taking from it what it clearly expresses, or putting that into it which is not there, explicitly or impliedly. Even a failure of justice,<sup>111</sup> or a defeat of the object of the enactment<sup>112</sup> will not authorize the court, “where the Legislature have enacted something which leads to an absurdity, to repeal that enactment and make another for them, if there are no words to express that intention,”<sup>113</sup> to which the court may be convinced, from outside considerations, they meant to give effect. And, where the provisions of an act are such, as, if made operative,

<sup>106</sup> Post, § 318, *Nichols v. Haliday*, 27 Wis. 406; and see *Philadelphia v. Pass. Ry. Co.*, 102 Pa. St. 190, 197.

<sup>107</sup> *Chapman v. State*, 16 Tex. App. 76.

<sup>108</sup> *Wear Comm'rs v. Adamson*, L. R. 2 App. Cas. 743, 764-5.

<sup>109</sup> *Wilb.*, 114-115.

<sup>110</sup> *Smith v. Bell*, 10 M. & W. 378. *Comp. Ryegate v. Wardsboro*, 30 Vt. 746, ante, § 249.

<sup>111</sup> See *Pitman v. Flint*, 10 Pick. (Mass.) 506, ante, § 155.

<sup>112</sup> See ante, § 6.

<sup>113</sup> *Woodward v. Watts*, 2 E. & B. 452, 453.

would violate the declared meaning and intent—to carry out which, all other parts of the act must yield<sup>114</sup>—the courts have no discretion but to construe the act as inoperative.<sup>115</sup>

<sup>114</sup> *Farmers' B'k v. Hale*, 59 N. Y. 53.

<sup>115</sup> *Ibid.* And a local act whose purpose it is to repeal a general act

as to a certain county, is wholly nugatory where the latter act has been already repealed by a general act: *Reed's App.*, 114 Pa. St. 452.

## CHAPTER X.

PRESUMPTION AGAINST CONSTRUCTION PERMITTING IMPAIRING  
OF CONTRACTS, ADVANTAGE FROM OWN WRONG, AND  
RETROSPECTIVE OPERATION.

- § 267. Presumption against Impairing Contracts or Advantage from Wrong.
- § 269. "Void"—"Voidable."
- § 271. General Presumption against Retrospective Operation.
- § 272. Prospective Effect apparently Contrary to Words.
- § 273. Acts affecting Vested Rights.
- § 277. Acts imposing New Liabilities.
- § 278. Acts conferring Benefits.
- § 279. Acts creating Disabilities and Limitations.
- § 280. What not within Rule against Retroaction. Inchoate Rights, etc.
- § 282. Effect of Legislation in General upon Pending Causes.
- § 283. Where Retrospective Operation is to be Given. Clear Intent.
- § 284. Where no Vested Rights affected.
- § 285. Acts Relating to Procedure.
- § 288. Effect of Acts relating to Procedure Only on Pending Proceedings.
- § 290. Limits of this Rule.
- § 291. Curative and Declaratory Laws.
- § 294. Amendments.

§ 267. **Presumption against Impairing Contracts or Advantage from Wrong.**—On the general principle of avoiding injustice and absurdity, any construction would be rejected, if escape from it were possible, which enabled a person to defeat or impair the obligation of his contract by his own act, or otherwise to profit by his own wrong. Thus, an Act which authorized justices to discharge an apprentice under certain circumstances, from his indenture, "on the master's appearance" before them, would justify a discharge in his wilful absence. The Act, it was observed, must have a reasonable construction, so as not to permit the master to take advantage

of his own obstinacy. It would be very hard that, supposing the master was profligate and ran away, the apprentice should never be discharged (a). [So, under a statute requiring the defendant in certain actions to file, within a specified time, an affidavit of defence, and in default thereof entitling the plaintiff to judgment, although the act was declared to be out of the course of the common law, and incapable of being extended beyond its terms,<sup>1</sup> and although, primarily, it certainly contemplated the appearance of the defendant in court<sup>2</sup>—it was nevertheless held that the failure of a defendant, duly served with process, to enter an appearance could not effect the plaintiff's right to a judgment for want of an affidavit of defence, where none was filed within the time limited; there being no reason why a defendant should have it in his power to evade the operation of the statute by not appearing in the action in obedience to the summons, and thus, by his own wrongful act, to gain an advantage over his adversary.\*] For similar reasons, an Act (30 & 31 Vict. c. 84) which authorized a justice to summon a parent "to appear with his child" before him, for breach of the Vaccination Act, and "upon his appearance," to order the vaccination of the child, if he should find that it had not already undergone that operation, was held to authorize such an order without the appearance of the child, when the parent refused to produce it. A literal construction, making the production of the child a condition precedent to the making of the order, would have involved the supposition that the Legislature had intended to allow the parent to defeat its object by disobeying the summons which it had ordered (b). A trustee in bankruptcy who has received a sum, would be liable to arrest under the provision of the Debtors' Act of 1869, which makes a trustee liable to imprisonment for disobeying an order to pay a sum "in his possession or his control," though in fact he had spent it all (c). [It has

(a) *Dutton's Case*, 2 Salk. 490.

<sup>1</sup> *Yeates v. Meadville*, 56 Pa. St. 21; *Wall v. Dovey*, 60 Id. 213.

<sup>2</sup> See ante, § 249.

<sup>\*</sup> *Slocum v. Slocum*, 8 Watts (Pa.) 367; *Clark v. Dotter*, 54 Pa. St. 215.

(b) *Dutton v. Atkins*, L. R. 6 Q. B. 673.

(c) 32 & 33 Vict. c. 71. s. 4; *Middleton v. Chichester*, L. R. 6 Ch. 153. See *Lewes v. Barnett*, 6 Ch. D. 252, 47 L. J. 144.



already been seen that, under an act imposing individual liability for the debts of a corporation upon its trustees, where they fail to make certain required returns, a member of the board of trustees which had been guilty of such dereliction cannot invoke the provision for his own benefit as against his fellows.<sup>4</sup>]

§ 268. An enactment that a company should not issue any share, that no share should vest until one-fifth of its amount was paid up, and that the shareholder who had not paid up one-fifth should have no right of property in the shares allotted to him, or capacity to transfer them, was considered as limited to protection to the public. To construe it as applying also to the benefit of the shareholder, would have been to absolve him from liability to pay up calls until he had paid the requisite proportion; or, in other words, to enable him to profit by his own default; a consequence too unjust and unreasonable to have been intended (a). [So, where a statute authorized the formation of railroad companies by persons subscribing articles of association, which were to be filed with the Secretary of the Commonwealth and become the charter of the company, but not until \$9,000 per mile had been subscribed, and ten per centum paid in good faith, and provided that no subscription should be taken without payment of ten per centum of the amount subscribed, it was held that one who subscribed the articles for such a corporation, but did not pay the ten per centum required, could not, in a suit upon his subscription, after the articles had been filed and the certificate of incorporation issued, be permitted to set up his default in avoidance of his obligation to pay the amount subscribed.<sup>6</sup> A statutory requirement that the supervisors of townships shall afford

<sup>4</sup> Ante, § 261. *Briggs v. Easterly*, 62 Barb. 51, is largely based on the principle that no person can, by his own transgressions, create a cause of action in his own favor against another.

(a) *East Gloucestershire R. Co. v. Bartholomew*, L. R. 3 Ex. 15. *Comp.*, however, *R. v. Staffordshire*, 7 East, 549, and *Exp. Par-*

*bury*, 3 DeG., F. & J. 80.

<sup>6</sup> *Garrett v. R. R. Co.*, 78 Pa. St. 465. And see the same principle asserted in *Morrison v. Dorsey*, 48 Md. 461; *Hager v. Cleveland*, 36 Id. 476; *Cabot, etc., Co. v. Chapin*, 6 Cush. (Mass.) 50, 373. Compare ante, § 137, *O'Hare v. Bank*, 77 Pa. St. 96, and *Penn v. Bornman*, 102 Ill 523.

the tax-payers of the same an opportunity of paying their road-taxes in labor gives no defence to a township in a suit by a contractor for work done on a bridge for the township, where the opportunity was not so afforded.\* Nor does a statute making eight hours a day's labor, and directing that "a stipulation to that effect shall be made a part of all contracts to which the state or any municipal corporation therein shall be a party," avoid a contract in which that stipulation has been omitted, nor forfeit the rights of the parties under it.<sup>7</sup> An illustration of the principle under discussion is afforded by a recent English case. A agreed with B to build certain houses within a specified time, B agreeing, on their completion, to grant A leases of the same, A to pay B a specified rent from the date of the agreement to the expiration of the leases. A failed to build the houses in the time fixed by the agreement, and before they were built, a statute rendered their erection illegal. In spite of the rule, that, where the performance of a contract is rendered illegal by law, the obligation is discharged,<sup>8</sup> it was held that A was not by the statute relieved from his obligation to pay the rent under the agreement.<sup>9</sup>]

§ 269. "Void"—"Voidable."—Although the 9 Anne, c. 14, enacted that bills and notes, founded on the consideration of money lost at play, should be "utterly frustrate, void, and of none effect, to all intents and purposes," its operation was confined to preventing the drawer (or any person claiming under him (a)) from recovering from the loser; but it left the instrument unaffected in the hands of an innocent indorsee for value suing the drawer (b). The statute was construed as if the words were voidable as against certain persons only, but were valid as regards others.

\* Oakland Tp. v. Martin, 104 Pa. St. 303.

<sup>7</sup> Babcock v. Goodrich, 47 Cal. 488.

<sup>8</sup> See post, § 461.

<sup>9</sup> Gibbons v. Chambers, 1 C. & E. 577.

(a) Bowyer v. Bampton, 2 Stra. 1155.

(b) Edwards v. Dick, 4 B. & A. 212 [See to similar effect: Fuller

v. Hutchings, 10 Cal. 523; Dade v. Madison, 5 Leigh (Va.) 401; but contra: Fenno v. Sayre, 3 Ala. 458; Ivey v. Nicks, 14 Id. 564; (unless induced by the loser to take it: see Jones v. Sevier, 1 Litt. (Ky.) 133; Chapin v. Dake, 57 Ill. 295; Unger v. Boas, 13 Pa. St. 601; Harper v. Young, 112 Id. 419. And see, upon the subject, 2 Randolph, Comm. Paper, § 517.]

So, where an Act provided that if the purchaser at an auction refused to pay the auction duty, when this was made a condition of sale, his bidding should be "null and void to all intents and purposes," it was held that the object of the enactment was completely attained by making the bidding void only at the option of the seller; thus avoiding the injustice and impolicy of enabling a man to escape from the obligation of his contract by his own wrongful act, which a literal construction would have involved (*a*).

An Act which required that indentures for binding parish apprentices should be for the term of seven years at least, declaring that otherwise they should be "void to all intents and purposes, and not available in any court or place for any purpose whatever," was held, nevertheless, to make an indenture for a shorter term only voidable at the option of the master or apprentice; or at all events to leave it so far valid that service under it sufficed to gain a settlement (*b*).

The Act of 3 Hen. 7, c. 4, which declared that gifts of goods and chattels in trust for the donor and in fraud of his creditors should be "void and of none effect," was early held to be so only as to those who were prejudiced by the gift, but not as between the parties (*c*). Though the Sunday Act has the effect of avoiding contracts made on Sunday by and with tradesmen and other classes of persons, in the course of their ordinary calling, the invalidity affects only those persons who, when contracting with them, knew their calling; but those who dealt with them in ignorance of it would be entitled to sue on the contract (*d*). [And, though made on Sunday, if not within the "ordinary callings" of the parties, it is not void at all;<sup>10</sup> and negotiable paper, drawn

(*a*) *Malins v. Freeman*, 4 Bing. N. C. 395. So, the usual stipulation in a lease that if any covenant is broken by the lessee, the lease shall be void, is construed as voidable only at the option of the lessor. The literal construction would enable a lessee to get rid of an onerous lease by wilfully breaking a covenant in it. See *per* Lord Cairns in *Magdalen Hospital v. Knotts*, 4 App. 332.

(*b*) 5 Eliz. c. 4; *R. v. St. Nicholas*, 2 Stra. 1066, Ca. Temp.

*Hardw.* 323; *Gray v. Cookson*, 16 East, 13; *R. v. St. Gregory*, 2 A. & E. 107; *Oakes v. Turquand*, L. R. 2 H. L. 325; *Burgess's Case*, 15 Ch. D. 507.

(*c*) *Ridler v. Punter*, Cro. Eliz. 291; *Bessey v. Windham*, 6 Q. B. 166. See *Philpotts v. Philpotts*, 15 C. B. 85.

(*d*) *Bloxome v. Williams*, 3 B. & C. 232.

<sup>10</sup> *Sanders v. Johnson*, 29 Ga. 526; and the burden of showing that the act was within the "ordi-

and accepted on Sunday, but dated as of another day, has been held valid in the hands of an innocent holder for value and without notice."<sup>11</sup>

§ 270. In all these cases the intention of the Legislature was considered as completely carried out by the restricted scope given to its enactments. But where, having regard to the general policy of the act as well as to the language and the structure of the sentence, it would not have that effect, the words abridging or avoiding the effect of instruments, contracts, and dealings would receive their primary and natural meaning. [So, under a statute whose object was the prevention of unjust attachments, by the instrumentality of sheriffs or their deputies, "who have great opportunities and means of defrauding creditors by secret attachments," and which, therefore, prohibited such from making or filling up any plaint, declaration, writ or process, and declared "all such acts done by either of them" void, it was held, that, where a writ and declaration were written by a deputy sheriff, an attachment made upon the writ, and the land seasonably set off on an execution issued on a judgment recovered in the suit, all these proceedings were void as against the debtor's conveyance of the land to a bonafide purchaser for a good consideration, before judgment."<sup>12</sup>

Where, indeed, a statute not only declares a contract void, but imposes a penalty for making it, it is not voidable merely (*a*). The penalty makes it illegal. In general, however, it would seem that where the enactment has relation only to the benefit of particular persons, the word "void" would be understood as "voidable" only, at the election of the persons for whose protection the enactment was made, and who are capable of protecting themselves; but that when

nary callings" of the parties is on him who sets up the defence to the statute. In Alabama it is held that a contract made on Sunday is not void where the exigency of the case required it, in order to prevent a threatened loss: *Hooper v. Edwards*, 25 Ala. 528. "We must not so construe as to make the act the means of escaping from payment of debt by removal of

property on Sunday," cit. *S. C.*, 18 Id. 280.

<sup>11</sup> *Ball v. Powers*, 62 Ga. 757.

<sup>12</sup> *Smith v. Saxton*, 6 Pick. (Mass.) 483. And see *Penn v. Bornman*, 102 Ill. 523, ante, § 137, note. Compare, however, *Jackson v. Collins*, 3 Cow. (N. Y.) 85, ante, § 98.

(*a*) *Gye v. Felton*, 4 Taunt. 876. [And see post, § 449 et seqq.]

it relates to persons not capable of protecting themselves, or when it has some object of public policy in view which requires the strict construction, the word receives its natural full force and effect (*a*). [Thus, it would be construed as meaning "voidable" in an act which provides, that, "if an owner of lands sold for taxes establishes fraud in the sale, the sale shall be void."<sup>13</sup> In a case above referred to,<sup>14</sup> it was said: "It has been argued, that by judicial construction . . . the extent and force of the term *void* have been limited, so that in truth it means voidable, or to be made void by some plea or act of the party in favor of whose interests such statutes are set up. And there is no doubt that such decisions . . . are founded in good sense and reason, and conform to the intention of the Legislature in their use of the term. An infant's acts, by the common law, are said to be void, and yet they may be confirmed on his coming of age. Usurious debts and gaming contracts are declared to be void, and yet a plea is necessary to avoid them, and a judgment precludes a partner from showing that they were void."<sup>15</sup> Properly speaking, the term void means of no legal force, null and incapable of confirmation or ratification.<sup>16</sup> That is absolutely void which the law or the nature of things forbids to be enforced at all.<sup>17</sup> What is void can always be assailed, in any proceeding; what is voidable can be assailed only in a direct proceeding instituted for that purpose.<sup>18</sup> The distinction, therefore, is of the greatest importance in its consequences as to third persons; for nothing can be founded upon what is absolutely void, whereas from those things which are voidable only fair titles may flow.<sup>19</sup> Nevertheless, it is a distinction which is often ignored in statutes, the word "void" being used where "voidable" is

(*a*) See *per* Bayley, J., in *R. v. Hipswell*, 8 B. & C. 471. See, also, *Betham v. Gregg*, 10 Bing. 352, and *Storie v. Winchester*, 17 C. B. 953.

<sup>13</sup> *Van Shaack v. Robbins*, 36 Iowa, 201.

<sup>14</sup> *Smith v. Saxton*, 6 Pick. (Mass.) 483.

<sup>15</sup> *Ibid.*, at pp. 486-7.

<sup>16</sup> *Van Shaack v. Robbins*, *supra*.

<sup>17</sup> *Seylar v. Carson*, 69 Pa. St. 81. Relatively void is that which is a wrong to individuals, and which the law refuses to enforce against them: *Ibid*.

<sup>18</sup> *Alexander v. Nelson*, 42 Ala. 462; and see *Swayne v. Lyon*, 67 Pa. St. 436, 441.

<sup>19</sup> *Crocker v. Bellangee*, 6 Wis. 645; *Bromley v. Goodrich*, 40 Id. 131.

really intended.<sup>20</sup> Hence it is said that the term "void," as used in statutes, does not ordinarily import absolute nullity,<sup>21</sup> but does so only in a clear case.<sup>22</sup>

§ 271. **General Presumption Against Retroactive Operation.**—Upon the presumption that the Legislature does not intend what is unjust rests the leaning against giving certain statutes a retrospective operation (*a*). *Nova constitutio futuris formam imponere debet, non præteritis*. They are construed as operating only on cases or facts which come into existence after the statutes were passed (*b*), unless a retrospective effect be clearly intended. [Indeed, the rule to be derived from the comparison of a vast number of judicial utterances upon this subject, seems to be, that, even in the absence of constitutional obstacles to retroaction, a construction giving to a statute a prospective operation is always to be preferred, unless a purpose to give it a retrospective force is expressed by clear and positive command, or to be inferred by necessary, unequivocal and unavoidable implication from the words of the statute taken by themselves and in connection with the subject-matter,<sup>23</sup> and the occasion of the enactment,<sup>24</sup> admitting of no reasonable doubt, but precluding all question as to such intention.<sup>25</sup> A few instances only of the

<sup>20</sup> *Van Shaack v. Robbins*, 36 Iowa, 201; *Crocker v. Bellangee*, supra; *Bennett v. Mattingly*, 110 Ind. 197, 202; *e. g.*, in a provision declaring void a married woman's contracts of suretyship for her husband; *Ibid*.

<sup>21</sup> *Kearney v. Vaughan*, 50 Mo. 284.

<sup>22</sup> *Brown v. Brown*, 50 N. H. 538, 552. Comp. ante, § 137. A California statute that no contract shall be binding on a company unless made in writing, is held to apply only to contracts wholly executory: *Foulke v. R. R. Co.*, 51 Cal. 365.

(*a*) 2 Inst. 292: [*Bedford v. Shilling*, 4 Serg. & R. (Pa.) 401, 403, *per* Tilghman, C. J. And see *Taylor v. Mitchell*, 57 Pa. St. 209, 212, *per* Sharswood, J.; *Albee v. May*, 2 Paine, 74; *Re Billings*, 3 Ben. 212.]

(*b*) *Per* Erle, C. J., in *Midland R. Co. v. Pye*, 10 C. B. N. S. 191;

*per* Cockburn, C. J., 2 Q. B. D. 269; *per* Pollock, C. B., in *Young v. Hughes*, 4 H. & N. 76; *Vansittart v. Taylor*, 4 E. & B. 910.

<sup>23</sup> See *Bay v. Gage*, 36 Barb. (N. Y.) 447.

<sup>24</sup> *People v. Supervisors of Essex*, 70 N. Y. 228.

<sup>25</sup> See *U. S. v. Heth*, 3 Cranch, 399; *Murray v. Gibson*, 15 How. 421; *Harvey v. Tyler*, 2 Wall. 329; *Chew Heong v. U. S.*, 112 U. S. 536; *U. S. v. Starr*, Hempst. 469; *Costin v. Washington*, 2 Cranch C. Ct. 254; *Prince v. U. S.*, 2 Gall. 204; *Warren Manuf'g Co. v. Ins. Co.*, 2 Paine, 501; *Ellis v. Ins. Co.*, 19 Blatchf. 383; *Re Billings*, 2 Ben. 212; *Tinker v. Van Dyke*, 14 Bankr. Reg. 112; *People v. Columbia Co.*, 43 N. Y. 130; *McMaster v. State*, 103 Id. 547; *Quackenbush v. Danks*, 1 Denio (N. Y.) 128; *Dash v. Van Kleeck*, 7 Johns (N. Y.) 477; *Shepherd v. People*, 24 How. Pr. (N. Y.) 388:

operation of this rule can be here given." An act declaring forfeiture of dower or curtesy, "whenever a married man shall be deserted by his wife, or a married woman by her husband," for the space of one year, was held to apply only to cases of desertion beginning after the statute went into operation.<sup>27</sup> A provision that married women shall be bound, like other persons, by estoppel in pais, was held inapplicable to the case of a mortgage made by such a person before the enactment.<sup>28</sup> An act amending a city charter and fixing the salaries of certain officials in the city was deemed prospective only,<sup>29</sup> and so was an act making it the duty of the auditor of a state to pay into the state treasury 75 per cent. of all fees collected by him, under the provisions of a certain earlier

Wade v. Strack, 1 Hun (N. Y.) 96; 3 Thomp. & C. 165; Whitney v. Hapgood, 10 Mass. 437; Somers v. Dighton, 12 Id. 383; Medford v. Learned, 16 Id. 215; Gerry v. Stoneham, 1 Allen (Mass.) 319; Garrett v. Wiggins, 2 Ill. 335; Mason v. Finch, 3 Id. 223; Guard v. Rowan, Id. 499; Bruce v. Schuyler, 9 Id. 221; Belleville R. R. Co. v. Gregory, 15 Id. 20; La Salle v. Blanchard, 1 Ill. App. 635; Bartruff v. Remey, 15 Iowa, 257; McIntosh v. Kilbourne, 37 Id. 420; Barnes v. Mobile, 19 Ala. 707; Hooker v. Hooker, 18 Id. 599; Brown v. Wilcox, 22 Miss. 127; Garrett v. Beaumont, 24 Id. 377; Williamson v. R. R. Co., 29 N. J. L. 311; State v. Scudder, 32 Id. 203; Vreeland v. Bramhall, 39 Id. 1; Elizabeth v. Hill, Id. 555; State v. Newark, 40 Id. 92; Warshung v. Hunt, 47 Id. 256; Neff's App., 21 Pa. St. 243; Fisher v. Farley, 23 Id. 501; Becker's App., 27 Id. 52; Dewart v. Purdy, 29 Id. 113; Ihmsen v. Nav. Co., 32 Id. 153, 156; Taylor v. Mitchell, 57 Id. 209; White v. Crawford, 84 Id. 433; People's Fire Ins. Co. v. Hartshorne, Id. 453; Stockwell v. McHenry, 107 Id. 237; Von Schmidt v. Huntington, 1 Cal. 55; Smith v. Aud. Gen., 20 Mich. 398; Saunders v. Carroll, 12 La. An. 793; McGeehan v. Burke, 37 Id. 156; Plumb v. Sawyer, 21 Conn. 351; Hastings v. Lane, 15 Me. 134; Torrey v. Corliss, 33 Id. 333;

Sturgiss v. Hull, 48 Vt. 302; Briggs v. Hubbard, 19 Id. 86; Richardson v. Cook, 37 Id. 599; Morgan v. Perry, 51 N. H. 559; State v. Atwood, 11 Wis. 422; Seaman v. Carter, 15 Id. 548; Finney v. Ackerman, 21 Id. 268; Gaston v. Merriam, 33 Minn. 271; State v. Wabholz, 28 Id. 114; Keringer v. Barnes, 14 Id. 398; Alexander v. Worthington, 5 Md. 471; State v. Auditor, 41 Mo. 25; State v. Blakeman, 52 Id. 578; State v. Ferguson, 63 Id. 77; Ryan v. Hoffman, 26 Ohio St. 109; Pritchard v. Spencer, 2 Ind. 486; Aurora, etc., Co. v. Holthouse, 7 Id. 59; Hopkins v. Jones, 22 Id. 310; Merwin v. Ballard, 66 N. C. 398; Forsyth v. Marbury, R. M. Charl. (Ga.) 324; Bond v. Munro, 28 Ga. 597; White v. Blum, 4 Neb. 555; State v. Stein, 13 Id. 529; Stewart v. State, 13 Ark. 720; Parsons v. Payne, 26 Id. 124; Martin v. State, 22 Tex. 214; and cases infra.

<sup>28</sup> It is a rule of construction established by law, in Georgia and Louisiana, that an act can prescribe only for the future, and in Kentucky, California, Georgia, Louisiana, Dakota, and Utah, that it can have no retrospective operation: Stimson, Amer. Stat. L., p. 143, § 1044.

<sup>27</sup> Giles v. Giles, 23 Minn. 348.

<sup>28</sup> Levering v. Shockey, 100 Ind. 558.

<sup>29</sup> State v. Hill, 32 Minn. 275.

statute, and of all other fees received by him on account of services rendered in a certain department of his office.<sup>30</sup> So, an act declaring that municipal lands used for agricultural purposes should be taxed higher for municipal purposes, than township lands for township purposes;<sup>31</sup> and another declaring county treasurers ineligible for more than two consecutive terms,<sup>32</sup> were each held devoid of retrospective force, so that the former act did not interfere with assessments made before its passage,<sup>33</sup> and the latter did not forbid a treasurer in office for a second term to hold it again.<sup>34</sup> A statute giving exclusive, in the place of former concurrent, jurisdiction would not be construed as operating retrospectively if another construction could be fairly given to it;<sup>35</sup> nor one doing the converse, where the effect would be to subject a party to damages.<sup>36</sup> And an act respecting written acknowledgments of rights of action will be given a prospective operation only;<sup>37</sup> as also an act establishing a rule for the computation of time,<sup>38</sup> and an act relating to appeals;<sup>39</sup> and one for the prevention of the spread of infectious and contagious diseases, and imposing upon the state liability for expenses incurred for that purpose;<sup>40</sup> and so, too, a by-law of a municipality passed under its charter authorizing it to prescribe terms upon which certain persons might reside therein.<sup>41</sup>

§ 272. **Prospective Effect Apparently Contrary to Words.**— [Even where there is that in the statute which would seem upon other principles of interpretation, to require a retroactive construction, the presumption against the same, in the absence of an intention otherwise demonstrable to give the statute such an effect, will overcome the influence of such

<sup>30</sup> *Henderson v. State*, 96 Ind. 437.

<sup>31</sup> *Stilz v. Indianapolis*, 81 Ind. 582.

<sup>32</sup> *State v. Stein*, 13 Neb. 529.

<sup>33</sup> *Stilz v. Indianapolis*, *supra*.

<sup>34</sup> *State v. Stein*, 13 Neb. 529.

<sup>35</sup> *State v. Littlefield*, 93 N. C. 614. See post, § 288.

<sup>36</sup> *McMichael v. Skilton*, 13 Pa. St. 215.

<sup>37</sup> *Van Rensselaer v. Livingston*, 12 Wend. (N. Y.) 490.

<sup>38</sup> *Edmundson v. Wragg*, 104 Pa.

St. 500.

<sup>39</sup> *White v. Blum*, 4 Neb. 555; so as not to apply to cases determined before its passage: *Ibid*. See *Cockran v. Douglass*, 25 Pitts. L. J. (Pa.) 120, post, § 272. But see post, §§ 285 et seq.

<sup>40</sup> *State v. Bradford*, 36 Ga. 422; so that the state would not be liable thereunder for such expenses incurred before the passage of the act: *Ibid*.

<sup>41</sup> *Costin v. Washington*, 2 Cranch C. Ct. 254.



rules. Thus, where an act amended and re-enacted a former one, which provided that every conveyance not recorded should be void as against attachment and judgment creditors, but omitted the words "hereafter made," contained in the earlier act, it was, nevertheless, held that the act could not apply to conveyances executed prior to the statute re-enacted by it.<sup>42</sup> And so, as it has been seen<sup>43</sup> that the strict grammatical sense of the language used by the Legislature may give way to a construction required by other rules of interpretation, words apparently importing a retroactive effect will yet, in the absence of other reasons supporting such literal construction, be so construed as to produce a prospective operation. Thus, an act which makes certain provisions "when any judgment is obtained" is construed as referring to such cases only "when any judgment is hereafter obtained,"<sup>44</sup> and so the provisions of an act regulating, with additional requirements, appeals "in all cases in which judgment shall have been rendered."<sup>45</sup> Where, indeed, the act is not of immediate operation, but limited to take effect at a future date, that form of grammatical construction requires a prospective operation. Thus, in a statute passed in April, to go into operation in October of the same year, it was provided "that in all cases of partition of real estate in any court, wherein a valuation shall have been made of the whole or parts thereof, the same shall be allotted to such one or more of the parties in interest, who shall, at the return of the rule to accept or refuse to take at the valuation offer in writing the highest price therefor above the valuation returned," etc. It was said by the Supreme Court of Pennsylvania, in denying to this provision any retrospective force: "This new rule of allotment [the Legislature] enacted should not go into effect before the 1st of October, 1856. As if they had said, whenever a valuation in parti-

<sup>42</sup> *Gaston v. Merriam*, 33 Minn. 271. The variation in the language would, under other circumstances, have been a potent indication of a change of intention: see post, §§ 382, 384.

<sup>43</sup> Ante, § 81.

<sup>44</sup> *State v. Connell*, 43 N. J. L. 106. An act imposing liability for

damages which "may be done" was held to be grammatically prospective, whilst "may have been done" would indicate the reverse: *Ihmsen v. Nav. Co.*, 32 Pa. St. 153, 156.

<sup>45</sup> *Cochran v. Douglass*, 25 Pitts. L. J. (Pa.) 120; Act 20 Apr. 1876, P. L. 43. See post, § 288.

tion shall have been made after the 1st of October, 1856, the new rule of allotment shall apply. This phrase, 'shall have been made,' is an instance of the future perfect tense. It contemplates a valuation perfected, but perfected in future, and the future of this statute was all subsequent to the specified date. Had it been repealed before that date, it would have had no future existence, and no operation whatever. Though not repealed, it must not have a construction that would give it effect during the period of its suspended animation, for this were to violate the will of its creator. Giving, then, to the words before us their genuine grammatical meaning, we hold them applicable not to a valuation made after the enactment of the law, but before it took effect, but only to valuations made after the law went into operation; and thus construed, the statute commences, for every purpose, in futuro, as Blackstone said all laws should do."<sup>46</sup> Similarly, the words "already sustained—" "<sup>47</sup> "heretofore" and "hereafter" "<sup>48</sup> are to be understood as referring to the date, not of the passage, of an act, but of its taking effect; and even in an amendment, the word "heretofore" was held to mean before the passage of the amendatory, not of the original, act."<sup>49</sup> Where a general statute declared, that, unless a different time is prescribed in any statute for its taking effect, it shall go into operation ninety days after its passage, an act was passed giving a lien for work and materials in the construction of a railroad, which should be prior to all other incumbrances placed on the property, "subsequently to the passage" of the act, it was held that a mortgage executed prior to the passage of the act was a superior lien to that of a claim for materials furnished after its passage, but before the expiration of the ninety days

<sup>46</sup> Dewart v. Purdy, 29 Pa. St. 113, 117. Comp. post, § 284.

<sup>47</sup> Jackman v. Garland, 64 Me. 133.

<sup>48</sup> Charles v. Lamberson, 1 Iowa, 435.

<sup>49</sup> People v. Wayne Circ. Judge, 37 Mich. 287. But see Moore v. Mausert, 49 N. Y. 332, where the word "hereafter," in an amendment was held to mean after the passage of the original act; and

McKibben v. Lester, 9 Ohio St. 627, where the phrase "under the restrictions and limitations herein provided," occurring in an amendment, was construed as referring to the restrictions and limitations provided in the original act as it stood after all the amendments made thereto were introduced in their proper places therein. See ante, §§ 195-196.

when the act could take effect, the word "passage" being thus construed as "taking effect."<sup>50</sup>]

§ 273. **Acts Affecting Vested Rights.**—It is chiefly where the enactment would prejudicially affect vested rights, or the legal character of past transactions,<sup>51</sup> that the rule in question prevails.<sup>52</sup> Every statute, it has been said, which takes away or impairs vested rights acquired under existing laws, or creates a new obligation, or imposes a new duty, or attaches a new disability in respect of transactions or considerations already past, must be presumed, out of respect to the Legislature (a), to be intended not to have a retrospective operation (b). [On the contrary, it was said in a recent case in England, *prima facie* the general rule of construing acts of Parliament is that they are prospective, and rights are not to be interfered with unless there are express words to that effect.<sup>53</sup> And this requisite of express declaration, positive expression, and the like, has been repeatedly insisted upon in decisions in this country;<sup>54</sup> and it has been stated, that, however broad and general in its terms, a statute is not to be construed as interfering with existing contracts, rights of action, or suits, unless the intention that it shall so operate is expressly declared.<sup>55</sup> So far as rights and obligations resting upon contracts are concerned, constitutional provisions interpose, in America, insuperable obstacles to legislative impairment or destruction of the same, and similar provisions in some of the states protect rights of

<sup>50</sup> *Andrews v. R. R. Co.*, 16 Mo. App. 299. See for like construction of the word "passage," under a similar constitutional provision: *Harding v. People*, (Col.) 15 Pac. Rep. 727; ante, § 181.

<sup>51</sup> *McMaster v. State*, 103 N. Y. 547.

<sup>52</sup> See *Albee v. May*, 2 Paine, 74; *Hickson v. Darlow*, 52 L. J., Ch. D. 454 (aff'd L. R. 23 Ch. D. 690); *Allhusen v. Brooking*, L. R. 26 Ch. Div. 564; *Dash v. Van Kleeck*, 7 Johns. (N. Y.) 477; *Sayre v. Wisner*, 8 Wend. (N. Y.) 661; *Quackenbush v. Danks*, 1 Denio (N. Y.) 128; *Bedford v. Shilling*, 4 Serg. & R. (Pa.) 401; *State v. Atwood*, 11 Wis. 422;

*Bowen v. Striker*, 100 Ind. 45, and many of the cases already referred to.

(a) *Per* Chancellor Kent in *Dash v. Van Kleeck*, 7 Johnson, 502, &c.

(b) *Per* Story, J., in *Soc. for Propag. of Gosp. v. Wheeler*, 2 Gallison, 139; and see *per* Chase, J., in *Calder v. Bull*, 3 Dallas, 386, 390.

<sup>53</sup> *Allhusen v. Brooking*, L. R. 26 Ch. D. 564, *per* Chitty, J.

<sup>54</sup> See *Bedford v. Shilling*, 4 Serg. & R. (Pa.) 400, 408, *per* Tilghman, C. J.; *Lefever v. Witmer*, 10 Pa. St. 506, 507, *per* Gibson, C. J.

<sup>55</sup> *Berley v. Rampacher*, 5 Duer (N. Y.) 183; *People v. Supervisors*, 63 Barb. (N. Y.) 85.

property and of action. Beyond that, whilst the rule above stated is probably too strict and narrow,<sup>55</sup> whatever the legislative power upon the subject may be, an intention to subvert rights of property, vested rights, should never be imputed to a statute unless indicated in such terms, having regard to all legitimate means of interpretation,<sup>57</sup> as admit of no doubt, but show a clear design to effect that particular and specific purpose.<sup>58</sup> General terms which may, but must not of necessity, apply, and which the Legislature has not particularly applied to the case, and consequently implied or constructive repeals, cannot effect it.<sup>60</sup>

§ 274. The provision of the Statute of Frauds, that no action should be brought to charge any person on any agreement made in consideration of marriage, unless the agreement were in writing, was held not to apply to an agreement which had been made before the Act was passed (a). The Mortmain Act, in the same way, was held not to apply to a devise made before it was enacted (b). And the Apportionment Act of 1870, which enacts that after the passing of the Act, rents are to be considered as accruing from day to day, like interest, and to be apportionable in respect of time accordingly, would seem not to apply to a will made before the Act, though the testator died after it came into operation (c). [So, the Pennsylvania act of 1855, requiring devises, etc., to charities to be attested by two disinterested witnesses, and made at least one month before the testator's death, was held inapplicable to a will executed before the passage of the act, but taking effect thereafter;<sup>60</sup> and the act of 1833, providing that real estate acquired by the testator after the date of his will should pass by a general devise, was similarly restricted.<sup>61</sup>] The testator

<sup>55</sup> See post, §§ 283 seq.

<sup>57</sup> See ante, § 271.

<sup>58</sup> See Rutherford v. Greene, 2 Wheat. 196.

<sup>59</sup> See Rutherford v. Greene, supra.

(a) Gilmore v. Shuter, 2 Lev. 227; 2 Mod. 310; Ash v. Abdy, 3 Swanst. 664. See also Doe v. Page, 5 Q. B. 767; Doe v. Bold, 11 Q. B. 127.

(b) Atty.-Genl. v. Lloyd, 3 Atk. 551; Ashburnham v. Bradshaw, 2 Atk. 36.

(c) Jones v. Ogle, L. R. 8 Ch. 192.

<sup>60</sup> Taylor v. Mitchell, 57 Pa. St. 209.

<sup>61</sup> Mullock v. Souder, 5 Watts & S. (Pa.) 198. Comp. post, §§ 284, 292.

was presumed to have in view the state of the law when he made his will.<sup>62</sup> The contrary presumption that the testator who left his will unaltered after the Act was passed, intended that it should operate on the will (a) would imply that he knew that the law had been changed. So, it was held that the Act of 8 & 9 Vict. c. 109, which made all wagers void, and enacted that no action should be brought or maintained for a wager, applied only to wagers made after the Act was passed (b); and the Kidnapping Act of 1872, which made it unlawful for a vessel to carry native laborers of the Pacific Islands without a license, did not apply to a voyage begun before the Act was passed (c). The Bills of Sale Act of 1882, which made void bills of sale not registered within seven days of their execution, was held not to apply to instruments executed before the Act came into operation. Compliance, it is evident, would have been impossible where the deed had been executed more than seven days before the Act passed (d). The 20 Vict. c. 19, which declared that extra-parochial places should, for poor-law and other purposes, be deemed parishes, was held not retrospective, so as to confer the status of irremovability on a pauper who had resided in such a place for five years before the Act (e).

§ 275. [Where a bounty offered by a statute had been earned, its reduction in amount by a subsequent statute amending the original law could not affect the right acquired under the latter.<sup>63</sup> Nor was a statute permitted to have a retroactive effect so as to cut off an accepted bid

<sup>62</sup> Just as contracts are presumed to have been entered into with reference to the laws then in force, which, therefore, are to be deemed as forming a portion of their essence, and with reference to which they are to be construed: see *Reynolds v. Hall*, 2 Ill. 35; *Feemster v. Ringo*, 5 T. B. Mon. (Ky.) 336; *Duckham v. Smith*, Id. 372.

(a) *Per Jessel, M. R.*, in *Hasluck v. Pedley*, 19 Eq. 274.

(b) *Moon v. Durden*, 2 Ex. 22; *Pettanberdass v. Thacokorseydass*, 7 Moo. P. C. 239. See *Exp.*

*White*, 33 L. J. Bcy. 22.

(c) 36 & 37 Vict. c. 19, *Burns v. Nowell*, 5 Q. B. D. 444, 49 L. J. 468.

(d) *Hickson v. Darlow*, 52 L. J. Ch. D. 453; *aff'd*, L. R. 23 Ch. D. 690.

(e) *R. v. St. Sepulchre*, 28 L. J. M. C. 187, 1 E. & E. 813; and see *R. v. Ipswich Union*, 2 Q. B. D. 269; *Sunderland v. Sussex*, 51 L. J. M. C. 33; *Barton Regis v. Liverpool*, 3 Q. B. D. 295; *Gardner v. Lucas*, 3 App. 582.

<sup>63</sup> *People v. State Auditors*, 9 Mich. 327.

for certain work where the acceptance, under the law in force when it was signified, made the same binding." An act forbidding the enforcement of a vendor's lien, unless recorded, after a conveyance by the vendee, could not affect such liens acquired before the passage of the act, though unrecorded, because then the lien was independent of any title-bond or mortgage, and was a vested right in the vendor.<sup>65</sup> So, an act prohibiting the enforcement of judgments by the sale of defendant's property in certain specified cases was held inapplicable to judgments rendered before its passing.<sup>66</sup> And an act giving to administrators certain powers over the lands of defendants, was held inapplicable to cases, and not to authorize them to take possession of lands, the property in which had vested in the heirs before its passage.<sup>67</sup> So the statutes, enlarging the rights of married women over their property, and curtailing the interests of husbands in, and their control over, the same, have been uniformly held not to destroy any rights in such property vested in husbands at the date of their enactment.<sup>68</sup> And so a statute changing the rule as to dower.<sup>69</sup> An act abolishing a district in a county for the election of a revenue commissioner, providing that thereafter the county should have

<sup>64</sup> *Re Prot. Episc. School*, 58 Barb. (N. Y.) 161.

<sup>65</sup> *Jordan v. Wisner*, 45 Iowa, 65. See *Evans v. Williams*, 2 Dr. & S. 324, post, § 276.

<sup>66</sup> *Lockhart v. Tinley*, 15 Ga. 496.

<sup>67</sup> *Van Fleet v. Van Fleet*, 49 Mich. 610.

<sup>68</sup> See *Jassoy v. Delius*, 65 Ill. 469; *Bowden v. Gray*, 49 Miss. 547; *Lefever v. Witmer*, 10 Pa. St. 505; *Mann's App.*, 50 Id. 375; *Quigley v. Graham*, 18 Ohio St. 42; *Hershizer v. Florence*, 39 Id. 516; *Metrop. B'k v. Hitz*, 1 Mackey (D. C.) 111; *Booknight v. Epting*, 11 S. C. 71; *Darrenberger v. Haupt*, 10 Nev. 43; *Edwards v. Edwards*, 1 C. & E. 229. See § 278; but see § 281.

<sup>69</sup> *Noel v. Ewing*, 9 Ind. 37. When a mortgage was made, the wife's inchoate interest in her husband's land, as then defined by

law, could become vested only upon her surviving him. By the subsequent act of 1875, it was made to vest upon transfer of title to a purchaser. It was held that the latter act was inapplicable to the case of the mortgage referred to, so as to affect the rights of the mortgagee: *McGlothlin v. Pollard*, 81 Ind. 228. See same principle in *Leaser v. Owen Lodge*, 83 Id. 498, as to act 1881 vesting wife's interest on execution of sheriff's deed. The opposite effect was given to an act destroying the wife's dower in the husband's lands sold on execution during his lifetime: *Surtivant v. Norris*, 30 Iowa, 65. As to the effect of the statute of limitations upon a widow's right of dower in lands aliened by the husband in his lifetime, see *Care v. Keller*, 77-Pa. St. 487.

but one commissioner, and providing that the act should be in force from its passage, was, nevertheless, held not to abridge the term of office of the commissioner then acting, or his authority to act during the period for which he was elected.<sup>70</sup> An act giving to the grantee of a life-tenant, when sued by the remainderman, upon the determination of the life estate, the benefit of the increased value of the premises by reason of improvements made by the life-tenant, would not affect the rights of parties except where the improvements were made after its passage.<sup>71</sup> So, an act giving the husband without an estate by the courtesy in his wife's lands the benefit of improvements placed by him upon them;<sup>72</sup> and an act giving a similar benefit to bona fide occupants of real estate.<sup>73</sup> An act relieving the husband of his common law liability for the debts of his wife, *dum sola*, was held not to be retroactive,<sup>74</sup> and a statute forbidding ejectment for mortgaged premises before foreclosure, not to apply to mortgages given before its enactment.<sup>75</sup>]

§ 276. The Bankrupt Act of 1849, which made a deed of arrangement "now or hereafter" entered into by a trader with six-sevenths of his creditors binding on the non-executing creditors, at the expiration of three months after they "should have had" notice, was held to apply only to deeds executed after the passing of the Act (*a*). To apply such an enactment to past transactions, even though the property had been completely distributed among the creditors who had signed, would have been so unjust, that it was justifiable to seek any means of getting rid of the apparent effect of the word "now," which was accordingly understood as restricted to arrangements not completed but yet binding in equity at the time when the Act was passed. So, a non-

<sup>70</sup> *Peters v. Massey*, 33 Gratt. (Va.) 368.

<sup>71</sup> *Folsom v. Clark*, 73 Me. 44.

<sup>72</sup> *Shay's App.*, 51 Conn. 162.

<sup>73</sup> *Wilson v. Red Wing Sch. Distr.*, 22 Minn. 488.

<sup>74</sup> *Clawson v. Hutchinson*, 11 S. C. 323.

<sup>75</sup> *Baldwin v. Cullen*, 51 Mich. 33. And see *Hopkins v. Jones*, 22 Ind. 310.

(*a*) 12 & 13 Vict. c. 106; *Waugh*

*v. Middleton*, 8 Ex. 352, 22 L. J. Ex. 109; *Marsh v. Higgins*, 9 C. B. 551; 1 L. M. & P. 253; *Larpent v. Bibby*, 5 H. L. 481; 24 L. J. Q. B. 301; *Noble v. Gadban*, 5 H. L. 504; *Exp. Phoenix Bessemer Co.*, 45 L. J. Ch. 11. See also *Reed v. Wiggins*, 13 C. B. N. S. 220; 32 L. J. 131. *Comp. Elston v. Braddick*, 2 Cr. & M. 435; *Exp. Dawson*, L. R. 19 Eq. 433.

trader was held not liable to adjudication as a bankrupt in respect of a debt contracted before the enactment, which first made non-traders liable to the bankruptcy laws (*a*). So, it was held that the heavier legacy duty imposed on annuities by the Succession Act of 1853, did not affect an annuity left by a testator who died before that Act came into operation; though the payment was not made till after it was in force (*b*). The first section of the Mercantile Law Amendment Act of 1856, which provides that no *fi. fa.* shall prejudice the title to goods, of a bona fide purchaser for value, before actual seizure under the writ, was held not to apply where the writ had been delivered to the sheriff before the Act was passed. As the execution creditor had the goods already bound by the delivery of the writ, the statute, if retrospective, would have divested him of a right which he had acquired (*c*).

The 14th section of the same Act, which provides that a debtor shall not lose the benefit of the Statute of Limitations by his co-debtor's payment of interest, or part payment of the principal, was held not to affect the efficacy of such a payment made before the Act was passed (*d*). A different decision would have deprived the creditor of a right of action against one of his debtors. The provision in the Judicature Act of 1875, that in winding up companies whose assets are insufficient, the bankruptcy rules as to the rights of creditors and other matters shall apply, was held not to reach back to a company already in liquidation when the act was passed (*e*).

The 23 & 24 Vict. c. 38, s. 4, which enacted that no judgment which had not already been, or should not thereafter be entered and docketed, should have any preference against heirs or personal representatives, in the administration of the property of the deceased debtor, did not, for a similar reason, extend to a judgment obtained against a debtor who had died before the Act was passed (*f*). And acts

(*a*) *Williams v. Harding*, L. R. 1 N. 559, 28 L. J. Ex. 286.

H. L. 9.

(*b*) *Re Earl Cornwallis*, 25 L. J. B. 778, 27 L. J. Q. B. 448.

Ex. 149, 11 Ex. 580.

(*c*) *Williams v. Smith*, 4 H. &

(*d*) *Jackson v. Woolley*, 8 E. &

(*e*) *Re Suche & Co.*, 1 Ch. D. 48.

(*f*) *Evans v. Williams*, 2 Dr &



requiring the recorder of deeds, etc., to keep a direct and an adsectum index, and providing that the entry of recorded deeds and mortgages in such indexes shall be notice to all persons of the recording of the same, was held not to be retroactive so as to apply to an instrument recorded before the passage of either of such acts.<sup>76</sup>

§ 277. **Acts Imposing New Liabilities.**—[An act imposing new liabilities will not be construed to have a retroactive effect; as, where an act passed in 1839, provided that ten per cent. damages should be awarded against an administrator, and his sureties on his bond; it was held inapplicable to a bond executed in 1837.<sup>77</sup> So an act prescribing new penalties against defaulting tax payers;<sup>78</sup> making the defence of usury unavailable to bona fide endorsers;<sup>79</sup> allowing actions against railroad companies, common carriers and towns for loss of life by negligence;<sup>80</sup> increasing the costs on conviction for an offence.<sup>81</sup> And the acts imposing liabilities upon married women, in respect of their torts and contracts, have been held not to apply retroactively to their torts committed, or contracts made, before the passage of such statutes.<sup>82</sup>]

§ 278 **Acts Conferring Benefits.**—The 5 & 6 Vict. c. 45 which first gave the exclusive right of public performance of copyright music, was held not to extend to compositions published before the Act (*a*). Even a statute which confers a benefit, such as abolishing a tax, would not be construed retrospectively, to relieve the persons already subject to the burden before it was abolished. An Act passed in August, providing that on all goods captured from the enemy, and

S. 324, 34 L. J. 661. [See *Jordan v. Wisner*, 45 Iowa, 65, ante, § 275.]

<sup>76</sup> *Stockwell v. McHenry*, 107 Pa. St. 237.

<sup>77</sup> *Steen v. Finley*, 25 Miss. 535.

<sup>78</sup> *Bartruff v. Remey*, 15 Iowa, 257.

<sup>79</sup> *North Bridgewater B'k v. Copeland*, 7 Allen (Mass.) 139.

<sup>80</sup> *Kelly v. R. R. Co.*, 135 Mass. 448.

<sup>81</sup> *Caldwell v. State*, 55 Ala. 133.

To apply such an act to convictions for offences committed before its passage, it was there said, would be to give it an ex post facto operation.

<sup>82</sup> See *Bryant v. Merrill*, 55 Me. 515; *Lee v. Lanahan*, 59 Id. 478; *Hershizer v. Florence*, 39 Ohio St. 516; *Turnbull v. Forman*, L. R. 15 Q. B. D. 234; *Conolan v. Leyland*, L. R. 27 Ch. D. 632.

(*a*) *Exp. Hutchins*, 4 Q. B. D. 90.

made prize of war, a deduction of one-third of the ordinary duties should be made, did not apply where the prize with her cargo, though condemned in September, had been brought into port in June, when certain duties accrued due (a). [So, an act which conferred upon "any borough" a series of powers not theretofore possessed by boroughs under the general borough law of the state, was held to apply only to boroughs incorporated under it.<sup>82</sup> And where a married woman, after the passage of an act conferring certain enlarged rights and powers upon married women in respect of their property, comes into possession of real estate, drawing her title through a will that took effect and vested her right of property in the land before the passage of the act, her rights in the same are determined by the law as it stood prior to the passage of the enabling statute.<sup>84</sup>]

Although the Divorce Act, 20 & 21 Vict. c. 85, provided that when a magistrate's order for protecting a deserted married woman's property against her husband was made, the woman should be, and "be deemed to have been during the desertion," capable of suing and being sued, such an order would not enable her to maintain an action which she had begun before the order, but after the desertion (b). The 5 & 6 Will. 4, c. 83, s. 1, which empowered a patentee, with the leave of the Attorney-General, to enroll a disclaimer of any part of his invention, and declared that such disclaimer should be deemed and taken to be part of his patent and specification, was construed by the Court of Exchequer as enacting that the disclaimer should be so taken

(a) *Prince v. U. S.*, 2 Gallison, 204.

<sup>82</sup> *Com'th v. Montrose*, 52 Pa. St. 391. There were, however, in the context certain peculiarities which aided this restricted and exclusively prospective interpretation.

<sup>84</sup> *White v. Hilton*, 2 Mackey (D. C.) 339. And see, to same effect, *Carpenter v. Browning*, 98 Ill. 282; *Harris' Settled Est.*, L. R. 28 Ch. D. 171; *Edwards v. Edwards*, 1 C. & E. 229. As to the effect of such acts upon the husband's interest in the wife's lands before the act, see ante, § 275.

(b) *The Midland R. Co. v. Pye*, 10 C. B. N. S. 179, 30 L. J. C. P. 314. She had no right to sue before the order was obtained, and the Act did not intend to cast a liability on the defendants that they were not already under, and take away their defences from them, by such an order: *Per Erle, C. J.*, *ib.*; *Comp. Warne v. Beresford*, *infra*, § 286. [As to the right of married women, under statutes permitting them to sue alone for torts done them, to do so upon causes of action arising before the passage of such acts, see post, § 287.]

"from thenceforth"; the interpolation being deemed justifiable to avoid the apparent injustice of giving a retrospective effect to the disclaimer, and making a man a trespasser by relation (a). But this construction was rejected by the Common Pleas, on the ground that the enactment really worked no injustice in operating retrospectively (b).

§ 279. **Acts Creating Disabilities and Limitations.** — [Correspondingly, statutes imposing new disabilities will not be presumed to intend a retroactive application of their provisions; as, *e. g.*, an act forbidding banks to pay interest on deposits;<sup>85</sup> a proviso to an act extending the charter of a bank, that it should not take more than six per cent. discount, when previously it had been allowed seven;<sup>86</sup> or an act prohibiting the intermarriage of white persons with Indians.<sup>87</sup> It was also held that an act providing for a limitation to three years of all tax mortgages and tax privileges, applied only to future cases;<sup>88</sup> that an amendment limiting the time within which actions for personal injuries must be brought to one year did not apply to causes of action accrued before the amendment;<sup>89</sup> and so as to an act changing from three years to one the limitation as to proceedings for modifying or vacating a final order or judgment.<sup>90</sup> Conversely, it has been said that the defence of the statute of limitations, when a right of action has become barred by the same, is a vested right, not to be impaired by subsequent legislation,<sup>91</sup> and a change therein has, therefore, been held inapplicable in an action which had been brought, and in which a replication upon the old statute had been filed, before the statute making the change was passed,<sup>92</sup> and generally in suits upon causes of action arising anterior to the enactment of such alteration;<sup>93</sup> and an act reviving an earlier one which

(a) *Perry v. Skinner*, 2 M. & W. 471; and *per* Cresswell, J., in *Stocker v. Warner*, 1 C. B. 167.

(b) *R. v. Mill*, 10 C. B. 379.

<sup>85</sup> *Hannum v. B'k*, 1 Coldw. (Tenn.) 398.

<sup>86</sup> *Pearce v. B'k*, 33 Ala. 693.

<sup>87</sup> *Illinois L. & L. Co. v. Bonner*, 75 Ill. 315.

<sup>88</sup> *State v. Recorder*, 34 La. An. 178.

<sup>89</sup> *Goillotel v. New York*, 87 N. Y. 441; *Carpenter v. Shimer*, 24 Hun (N. Y.) 464.

<sup>90</sup> *Lee v. Cook*, 1 Wy. Ter. 413. See post, §§ 284, 287.

<sup>91</sup> See *Ryder v. Wilson's Ex'rs*, 41 N. J. L. 9.

<sup>92</sup> *Bradford v. Barclay*, 42 Ala. 375.

<sup>93</sup> *Bratton v. Guy*, 12 S. C. 42.

permitted executions on judgments more than five years after entry was confined to judgments thereafter rendered."<sup>94</sup> But this principle seems not to extend to statutes limiting the period within which prosecutions are permitted to be brought for crimes. Thus, where a person committed a crime, the prosecution for which, at the time, was limited to two years, it was held that an act passed after the expiration of the two years, repealing that limitation and extending the period within which a prosecution might be brought to three years beyond the original limit, warranted the prosecution of the offender."<sup>95</sup> Not quite so far goes a case which arose in Pennsylvania and involved the discussion and application of an act declaring that thereafter the offence of forgery should not be deemed barred by limitation, when the indictment was brought or exhibited within five years after the commission of the offence, the period previously limited having been two years. The act was held applicable to the case of a person who had committed a forgery within two years before its passage, but more than two years before his indictment. It was said that the statute could clearly not be classed as an *ex post facto* law, as it did not make that criminal which was not so when done,"<sup>96</sup> or an act punishable in a manner in which it was not punishable when committed;"<sup>97</sup> and that, as the two years had not completely run between the commission of the offence and the passage of the act, the offender had, therefore, at the later date, acquired no right to an acquittal on that ground. But, the effect of the preceding case is approached in the passage contained in the decision of the latter: "An act of limitation is an act of grace purely on the part of the Legislature. Especially is this the case in the matter of criminal prosecutions. The state makes no contract with criminals, at the time of the passage of an act of limitation, that they shall have immunity from punishment if not prosecuted within the statutory period. Such enactments are measures of

<sup>94</sup> Mann v. McAtee, 37 Cal. 11.

<sup>95</sup> State v. Moore, 42 N. J. L. 208.

<sup>96</sup> See Matter of Garland, 32 How. 241.

<sup>97</sup> See Fletcher v. Peck, 6 Cranch, 138; Shepherd v. People, 25 N. Y. 406; Hartung v. People, 23 Id. 104. Comp. Rich v. Flanders, 39 N. H. 305.

public policy only. They are entirely subject to the mere will of the legislative power, and may be changed, or repealed altogether, as that power may see fit to declare." And yet this broad doctrine is qualified in what follows: "Such being the character of this kind of legislation, we hold that, in any case where a right to acquittal has not been absolutely acquired by the completion of the period of limitation, that period is subject to enlargement or repeal."<sup>98</sup> The more extended doctrine of the New Jersey decision flows from the nature of the reasoning upon which it is based; it being argued, that, as an offender against a statute, which is repealed, may yet be punished under it when revived by the subsequent repeal of the repealing act,<sup>99</sup> there is nothing more than a phantastical distinction to be drawn between the revival of a right to prosecute, when such right has been suspended by the revocation of a statute in which it is inherent, and the revival of the right when the suspension has been the result of lapse of time under a statute of limitations,<sup>100</sup>—such a statute, in no sense, operating as a pardon of the offence.<sup>101</sup>]

§ 280. **What not within Rule against Retroaction. Inchoate Rights.**—But a statute is not retrospective, in the sense under consideration, because a part of the requisites for its action is drawn from a time antecedent to its passing (*a*). The 5th section of the Mercantile Law Amendment Act, which entitles a surety who pays the debt of his principal, to an assignment of the securities for it held by the creditor, would apply to the case of a surety who had entered into the suretyship before the Act, but had paid off the debt after it came into operation (*b*). The 2nd section of the Infants' Relief Act, which enacts that no action shall be

<sup>98</sup> *Com'th v. Duffy*, 96 Pa. St. 506, 514.

<sup>99</sup> *Com'th v. Getchell*, 16 Pick. (Mass.) 452; *Com'th v. Mott*, 21 Id. 492.

<sup>100</sup> *State v. Moore*, *supra*, at p. 234 (see the briefs of counsel in that case for a collection of views and authorities bearing upon the question); and see *Bish., Stat. Crimes*, §§ 265, 266.

<sup>101</sup> *State v. Moore*, *ubi supra*.  
*Comp. State v. Nichols*, 26 Ark. 74.

(*a*) *Per* Lord Denman in *R. v. St. Mary*, 12 Q. B. 127; *R. v. Christchurch*, Id. 149. See *R. v. Portsea*, 7 Q. B. D. 384, 50 L. J. 144. *Exp. Dawson*, 19 Eq. 433.

(*b*) *Re Cochran's Estate*, L. R. 5 Eq. 209.

brought on a ratification, made after majority, of a contract made during infancy, was held to apply to ratifications of contracts made before the Act was passed (*a*). The Court of Chancery, which acquired jurisdiction under the 23 & 24 Vict. c. 35, to relieve in respect of the forfeiture of a lease in consequence of a breach of a covenant to insure, exercised this new jurisdiction where the breach occurred after, but the lease had been made before the Act was passed (*b*). And the provision of the Conveyancing Act of 1881, which relieved tenants against forfeiture for breach of covenant, was held to apply to a case where judgment had been already given before the Act was passed, and the landlord might have obtained possession, but for a stay of proceedings to give the tenant time to appeal (*c*). [So, an act authorizing the imposition of a tax according to a previous assessment.<sup>102</sup> Nor does this objection affect an act enlarging the powers of married women because it applies to women, and to property belonging to women, who are covert at the date of its passage.<sup>103</sup> Upon a similar footing would seem to stand an act declaring that marriages between persons within the prohibited degrees of consanguinity should not be pronounced void after the death of either of the parties where the marriage was followed by cohabitation and the birth of issue; such an act being held to apply alike to marriages contracted before, and to those contracted after, the passage of the same.<sup>104</sup> And so an act "for the better security of mechanics" was held applicable when the work was done after the law took effect, though the contract therefor was entered into before its passage.<sup>105</sup>

(*a*) Exp. Kibble, L. R. 10 Ch. 873.

(*b*) Page v. Bennett, 2 Giff. 117, 29 L. J. Ch. 898.

(*c*) 44 & 45 Vict. c. 41, s. 14; Quilter v. Mapleson, 9 Q. B. D. 872.

<sup>102</sup> Locke v. New Orleans, 4 Wall. 172. See ante, § 260, note.

<sup>103</sup> See Goodyear v. Rumbaugh, 13 Pa. St. 481; Hill v. Goodman, 1 Woodw. (Pa.) 207; Cherokee Lodge v. White, 68 Ga. 742. Comp. Naylor v. Field, 29 N. J.

L. 287.

<sup>104</sup> Baity v. Cranfield, 91 N. C. 293. However, acts legitimizing children are liberally construed. See ante, § 108, Brower v. Bowers, 1 Abb. App. Dec. (N. Y.) 214.

<sup>105</sup> Miller v. Moore, 1 E. D. Smith (N. Y.) 739. . And see post, § 287. But see Shuffleton v. Hill, 63 Cal. 483, where an act giving a lien to loggers, etc., was held not to apply where the contract was entered into before the passage of the act.

§ 281. [Again, mere inchoate rights, depending for their original existence upon the law itself, may be abridged or modified by the Legislature at its pleasure, and statutes will not be presumed not to affect such rights existing in an unperfected state at the time of the enactment.<sup>106</sup> As a general rule, whenever a statute gives a right, in its nature not vested, but remaining executory, if it does not become executed before a repeal of the law giving it, it falls with the law and cannot be afterwards enforced.<sup>107</sup> So, the right to a penalty not reduced to judgment falls with the repeal of the statute creating the right of action, and cannot be afterwards enforced.<sup>108</sup> And so, where the law has predicated a right of one of two parties upon a certain relation between them, as to property owned or to be acquired by either of the parties, it may provide for the forfeiture of that right for non-fulfillment of the obligations of such relation, not only in so far as the same shall be entered into in the future, but also as regards rights springing as to future property, from such relations entered into in the past. Thus, it was held that an act allowing a married woman deserted by her husband to convey her real estate by her own sole deed, without his joinder, and thereby destroying his curtesy in the same, applied where the marriage was contracted before the passage of the act as to lands acquired after the same. In answer to the claim, that, before the passage of the act, the husband had such a vested right, not only in the property then owned by the wife, but also in that which she might subsequently acquire during their marriage, by virtue of the inherent power of the marriage contract, without regard to the performance

<sup>106</sup> *Smith v. Packard*, 12 Wis. 371; and see *People v. Livingstone*, 6 Wend. (N. Y.) 526, post, § 290.

<sup>107</sup> *Van Inwagen v. Chicago*, 61 Ill. 31: so held with reference to the right of a city to claim (under a local act which was held repealed by a later general one making a different disposition of the whole matter) for the city treasury 2 per cent. of the premiums effected by insurance companies not incorporated under the laws of the state.

<sup>108</sup> *State v. Youmans*, 5 Ind. 280.

See ante, § 257. It was held, in *Tobin v. Hartshorn*, 69 Ia. 648, that a penalty provided by statute to enforce the payment of a tax voted in aid of a railroad was but a remedy for its enforcement (see §§ 287, 290), in which the corporation had no vested right, except so far as the penalty (which accrued monthly) had already accrued, and that a repeal of the statute cut off its further operation as to a tax already voted. *Comp. Browning v. Cover*, 108 Pa. St. 595.

of that contract on his part, and as a right acquired at its inception, which could not be abridged, altered or modified by any power short of his own will, so long as the marriage relation was not legally dissolved, it was said by the court: "But the statement of this proposition is its own refutation. The very premise on which the Act is founded is that the marriage contract has been violated; that the husband has deserted his wife and refuses to support and maintain her. . . But, independently of the arguments which may be drawn from the nature of, and duties involved in, the marriage contract, . . . [the husband's] right to curtesy in his wife's estate was no part of the marriage contract, but it resulted from the operation of statutory enactments existing at the time of her death."<sup>109</sup> . . . [Her] title to the property in dispute had no existence until after the passage of the Act . . . and until the acquisition of that title [he] had no right in the premises inchoate or otherwise. . . On the other hand, whatever rights he may [thereafter] have had therein he held in subjection to the then existing laws."<sup>110</sup>

**§ 282. Effect of Legislation in General upon Pending Causes.—**

In general, when the law is altered pending an action, the rights of the parties are decided according to the law as it existed when the action was begun, unless the new statute shows a clear intention to vary such rights. Thus, the Medical Act, 21 & 22 Vict. c. 90, which enacts that no person shall, after the 1st of January, 1859, recover any charge for medical treatment "unless he shall prove at the trial" that he was on the Medical Register, was held not to apply to an action for medical services, begun before that date, but tried after it (a). An administration bond given to the Ordinary not being assignable until the 21 & 22 Vict. c. 95, an action begun by the assignee before that Act was

<sup>109</sup> See the same doctrine as to dower in Pennsylvania: *Meliset's App.*, 17 Pa. St. 449. And see *Guerin v. Moore*, 25 Minn. 462; *Morrison v. Rice*, 35 Id. 436, as to the right of the Legislature to take away the inchoate right of dower.

<sup>110</sup> *Moninger v. Ritner*, 104 Pa. St. 298.

(a) *Thistleton v. Frewer*, 31 L. J. Ex. 230; *Wright v. Greenroyd*, 1 B. & S. 758, 31 L. J. 4. Comp. *Leman v. Housley*, L. R. 10 Q. B. 66.



passed, was held not maintainable after it came into operation (*a*). [So, an act declaring inapplicable to prosecutions for misdemeanors a law which forbade the conviction of a defendant in a criminal case upon the uncorroborated evidence of an accomplice was held not to affect a pending prosecution.<sup>111</sup> To like effect, as to inapplicability to pending actions, was the rule enforced in the cases of an act requiring proof of payment of taxes in order to establish a claim of adverse possession;<sup>112</sup> of an act providing, that, where the plaintiff sued as a corporation, the fact of incorporation should be taken as admitted unless a special demand for proof of it be made;<sup>113</sup> and of an act conferring on the creditors of a defendant in an attachment proceeding the right to intervene and defend in case of his failure to do so, and providing, that, if the judgment be for the intervenor, it should be for any damages compensatory or vindictive, found by the jury, and should abate the suit.<sup>114</sup>]

**§ 283. Where Retrospective Operation is to be Given. Clear Intent.**—It is hardly necessary to add, that, [constitutional objections being out way,] whenever the intention is clear that the act should have a retrospective operation, it must unquestionably be so construed, however unjust and hard the consequences may appear (*b*). [Retrospective laws, unless *ex post facto*, or impairing the obligation of contracts, do not fall within the prohibition against such laws contained in the constitution of the United States.<sup>115</sup> Hence, within the scope of legislative power, an act will, and must, be given a retroactive efficacy, where such an intention clearly appears.<sup>116</sup> This proposition has, indeed,

(*a*) *Young v. Hughes*, 4 H. & N. 76.

<sup>111</sup> *Hart v. State*, 40 Ala. 32.

<sup>112</sup> *Sharp v. Blankenship*, 59 Cal. 288.

<sup>113</sup> *Goodwin, etc., Co. v. Darling*, 133 Mass. 358.

<sup>114</sup> *Powers v. Wright*, 62 Miss. 35: the statute is said to be remedial as to the intervenor, but penal as to the plaintiff: *Ibid.* Compare, upon this subject, post, §§ 284, 285, et seq.

(*b*) See ex. gr. *Stead v. Carey*, 1

C. B. 496; *Bell v. Bilton*, 4 Bing. 615.

<sup>115</sup> *Calder v. Bull*, 3 Dall. 386; *Satterlee v. Matthewson*, 2 Pet. 413; *Watson v. Mercer*, 8 Id. 88; *People v. Supervisors*, 63 Barb. (N. Y.) 85; *Reed v. Beall*, 42 Miss. 472; *Grim v. School Distr.*, 57 Pa. St. 433; *Lane v. Nelson*, 79 Id. 407; *Smith v. Gilder*, 26 Ark. 527.

<sup>116</sup> *Bambaugh v. Bambaugh*, 11 Serg. & R. (Pa.) 19. See also cases in preceding note, and § 271 and

been qualified so as to concede, when there was no escape from such construction, a retroactive effect to statutes which destroy or impair no vested rights.<sup>117</sup> But it would seem, that, in the absence of any restriction contained in the constitution of the particular state, going beyond that imposed by the federal constitutional, and expressly forbidding retrospective legislation or protecting vested rights against the interference of the Legislature, this limitation is untenable; and that the fact, that, a statute, clearly disclosing an intention to act retrospectively, and neither obnoxious to the objection of impairing the obligation of contracts, nor partaking of the character of an *ex post facto* law,<sup>118</sup> divests vested rights, gives no authority to the courts to refuse it such operation, however repugnant this may be to the principles of sound legislation.<sup>119</sup> And, however strong the presumption against an intention retrospectively to affect the rights of parties may be in mere private cases between individuals, in great national concerns, the contract of the nation, though sacrificing, for national purposes, individual rights acquired by war, must receive a construction conforming to its evident design, the question of compensation being one for the Government to consider, not for the courts.<sup>120</sup>

§ 284. **Where no Vested Rights Affected.**—[Still less potent is the presumption where no vested rights are affected. Thus, where an act declared, as a rule of construction of wills, that a general devise or bequest of the testator's real or personal estate should operate as an execution of a power of appointment, unless a contrary intention appeared in the will, and declared the act operative as to the wills of all persons who

notes, and *Smith v. Gilder*, 26 Ark. 527.

<sup>117</sup> See *People v. Spicer*, 99 N. Y. 225; *Tilton v. Swift*, 40 Iowa, 78; *Baldwin v. Newark*, 38 N. J. L. 158; *Sturgis v. Hull*, 48 Vt. 302.

<sup>118</sup> As to what constitutes such, see *Matter of Garland*, 32 How. 241; *Fletcher v. Peck*, 6 Cranch, 138; *Shepherd v. People*, 25 N. Y. 406; *Com'th v. Duffy*, 96 Pa. St. 506, 514; ante, § 279; *Caldwell v. State*, 55 Ala. 133, ante, § 277; *State v. Moore*, 42 N. J. L. 208, 231-2.

<sup>119</sup> *Weister v. Hade*, 52 Pa. St. 474; *Grim v. Sch. Distr.*, supra; *Lane v. Nelson*, supra; *Calder v. Bull*, supra; *Satterlee v. Matthewson*, supra; *Watson v. Mercer*, supra. And see *Clinton Bridge*, 10 Wall. 454, where it was held that an act legalizing a bridge over a navigable river will abate a suit ready for hearing, brought to enjoin its construction as a nuisance. See also *Dent v. Holbrook*, 54 Cal. 145.

<sup>120</sup> *The Peggy*, 1 Cranch, 103.

should die after the date of its passage, this was held to extend the act, in terms, to all cases of wills executed before, as well as after its passage, where the testator died since the same.<sup>121]</sup> An Act (33 and 34 Vict. c. 29, s. 14) which enacted that every person "convicted of felony" should forever be disqualified from selling spirits by retail, and that if any such person should take out, or have taken out a license for that purpose, it should be void, was held to include a man who had been convicted of felony before, and had obtained a license after the Act was passed. Although the expression "convicted of felony" might have been limited to persons who should thereafter be convicted, yet, as the object of the Act was to protect the public from having beerhouses kept by men of bad character, the language was construed in the sense which best advanced the remedy and suppressed the mischief; though giving, perhaps, a retrospective operation to the enactment (a). [Similarly, it was held that a statute which made one who had been convicted of the offence of petty larceny, and who should again commit the same offence guilty of a felony, was applicable to one who had committed the first offence prior to the taking effect of the statute.<sup>122]</sup> The provision in the Bankrupt Act of 6 Geo. 4, which protected "all payments made or which should thereafter be made" by a bankrupt before his bankruptcy, necessarily had a retrospective effect, unless the expression of payments "made" were to be altogether nugatory (b). After the passing of Lord Tenterden's Act, 9 Geo. 4, c. 14, which enacted that in actions grounded upon simple contracts, no verbal promise should be "deemed sufficient evidence" of a new contract to bar the Statute of Limitations, it was held that such a promise given before the Act, and which was then sufficient to bar the statute, could not be received in evidence in an action begun before, but not tried till after the passing of the Act (c). This decision has been sup-

<sup>121</sup> Aubert's App., 109 Pa. St. 447. Comp. ante, § 274.

(a) Hitchcock v. Way, 6 A. & E. 947; R. v. Vine, L. R. 10 Q. B. 195. 44 L. J. M. C., diss. Lush, J.; Chapell v. Purday, 12 M. & W. 303.

<sup>122</sup> Exp. Gutierrez, 45 Cal. 430.

(b) Churchill v. Crease, 5 Bing. 177.

(c) Hilliard v. Lenard, M. & M. 297; Towler v. Chatterton, 6 Bing. 258. [The Pennsylvania Act 8

ported on the ground that the time for deciding what is or is not evidence, is when the trial takes place;<sup>123</sup> and that when the Act told the judge what was and was not then to be evidence, he was bound to decide in obedience to it (a). But some stress is also to be laid on the circumstance that the Act did not come into operation until eight months after its passing; for the concession of this interval seemed to show that the hardship in question had been in the contemplation of the Legislature and had been thus provided for (b). [In the absence of such a provision, though not because thereof, a Vermont statute requiring a new promise, in order to have the effect of taking the case out of the statute of limitations, to be in writing, was held not to be retrospective.<sup>124</sup> On the other hand,] an Act which was passed in August, but not to come into operation till October, made non-traders liable to bankruptcy, was applied to a person who contracted a debt and committed an act of bankruptcy between those dates. It was considered that no injustice was done, since the Act had told him what would be the conse-

June, 1881, requiring certain proof of the defeasible character of deeds absolute on their face, "made after the passage of this act," is of course inapplicable to instruments executed before the act: *Nicolls v. McDonald*, 101 Pa. St. 514; *Hartley's App.*, 103 Id. 23.]

<sup>123</sup> It is said that statutes changing the rules of evidence respecting past transactions, are to be regarded as affecting the remedy only, and not as impairing the obligation of contracts: *Herbert v. Easton*, 43 Ala. 547. And it is said, in *Journey v. Gibson*, 56 Pa. St. 57, 60, that statutes retrospectively validating defective acknowledgments of deeds are sustainable only because supposed to operate, not upon the deed, or contract, changing it, but upon the mode of proof. At all events, such acts have, it seems, been pretty uniformly sustained: see *Journey v. Gibson*, *supra*; *Mercer v. Watson*, 1 Watts (Pa. 380; *Tate v. Stooltzfoos*, 16 Serg. & R. (Pa.) 35; *Fogg v. Holcomb*, 64 Iowa, 621; *Dentzel v. Waldie*, 30 Cal. 188. And see *Purcell v.*

*Goshorn*, 11 Ohio St. 641, where an act authorizing courts to correct mistakes in deeds of married women theretofore or thereafter made, was held retrospective. But see *McEwen v. Buckley's Lessee*, 24 How. 242; Ala., etc., *Ins. Co. v. Boykin*, 38 Ala. 510. The decision in *Routson v. Wolf*, 35 Mo. 174, also to the contrary, was under a provision of the constitution forbidding retrospective legislation. In *Wright v. Graham*, 42 Ark. 140, it was held that an act curing defective acknowledgments could not, in the Supreme Court, be applied to a case decided below before the passage of the act. But in *Underwood v. Lilly*, 10 Serg. & R. (Pa.) 97, a judgment was held cured by a validating act, though a writ of error had issued before its passage.

(a) *Per* Cresswell, J., in *Marsh v. Higgins*, 9 C. B. 551, 1 L. M. & P. 265. But comp. *sup.*, § 282.

(b) *Per* Park, J., 6 Bing. 264.

<sup>124</sup> *Richardson v. Cook*, 37 Vt. 599.

quence of contracting the debt, before he contracted it (*a*). On this ground, also, it was held that the 11 & 12 Vict. c. 43, s. 11, which limits the time for taking summary proceedings before justices to six months from the time when the matter complained of arose, was held fatal to proceedings begun after the passing of the Act, in respect of a matter which had arisen more than six months before it was passed (*b*); though the interval between the passing of the Act and its coming into operation was only six weeks. If the act had come into immediate operation, it was observed, the hardship would have been so great, that the inference might have been against an intention to give it a retrospective operation; but the provision suspending its operation, for however short a time, was to be taken as an intimation that the Legislature had provided it as the period within which proceedings respecting antecedent matters might be taken (*c*). [Upon similar reasons, a retroactive effect was given to statutes limiting the time within which suits might be brought,<sup>126</sup> and judgment liens enforced,<sup>127</sup> where ample time was left for the bringing of suits in the one case, and the enforcement of existing liens in the other.<sup>127</sup> And] in the same way the 10th section of the Merchantile Law Amendment Act, 1856, which enacted that no person should be entitled to commence an action after the time limited, by reason of his being abroad or in prison, was held to apply to causes of action which had accrued before the Act was passed. But some weight was due to the circumstance that another section of the same Act kept alive in express terms a cause of action already accrued, and thus afforded the inference that no such intention had been entertained, as none was expressed, as regards cases under the 10th section (*d*). [And when it is said that courts will, in the construction of statutes, presume against an intention to invade vested

(*a*) Exp. Rashleigh, 2 Ch. D. 9; comp. Williams v. Harding, L. R. 1 H. L. 9. [See ante, § 272.]

(*b*) R. v. Leeds R. Co., 18 Q. B. 343, 21 L. J. M. C. 193. See *per* Bovill, C. J., in Ings v. London and S. W. R. Co., L. R. 4 C. P. 19.

(*c*) *Per* Lord Campbell, 18 Q. B.

346.

<sup>125</sup> Fiske v. Briggs, 6 R. I. 557.

<sup>126</sup> Burwell v. Tullis, 12 Minn. 572.

<sup>127</sup> Comp. ante, § 279.

(*d*) Cornhill v. Hudson, 8 E. & B. 429; 27 L. J. Q. B. 8; Pardo v. Bingham, L. R. 4 Ch. 735.

rights, a distinction is to be drawn between the rights of private citizens and rights of counties, incorporated towns and cities,—public corporations created by the Legislature for political purposes, and invested with political powers to be exercised for the public good in the administration of civil government,—in fact, instruments of the government, subject at all times to the control of the Legislature with respect to their duration, powers, rights and property, and to the inspection, regulation, control and direction, in respect of its funds and franchises, of the government as the sole trustee of the public interest. As regards such corporations, there cannot, in any proper sense, be any question of an invasion of vested rights, nor any presumption against a design on the part of the Legislature to that effect which could materially affect the construction of a statute,<sup>128</sup> beyond the general presumption against an intention to change the law or the provisions of a charter.

[Moreover, an act may affect the vested interests of one class of persons and not those of another. For instance, an act authorizing devisees to mortgage devised property for the purpose of paying the testator's debts may bind the heirs and devisees who applied for the act, but cannot affect the rights of testator's creditors.<sup>129</sup>]

§ 285. **Acts Relating to Procedure.**—In several of the cases referred to in the preceding section the construction, though fatal to the enforcement of a vested right, by shortening the time for enforcing it, did not in terms take away any such right; and they would, consequently, appear to fall within the general principle that the presumption against a retrospective construction has no application to enactments which affect only the procedure and practice of the Courts (*a*), even where the alteration which the statutes make has been disadvantageous to one of the parties. Although to make a law for punishing that which, at the time when it was done, was not punishable, is contrary to sound principle; a law

<sup>128</sup> See *Hagerstown v. Sehner*, 87 Md. 180; *Moers v. Reading*, 21 Pa. St. 188.

<sup>129</sup> *Campbell's Case*, 2 Bland (Md.) 209.

(*a*) *Wright v. Hale*, 6 H. & N. 227; 30 L. J. Ex. 40.

which merely alters the procedure may, with perfect propriety, be made applicable to past as well as future transactions (*a*); and no secondary meaning is to be sought for an enactment of such a kind. No person has a vested right in any course of procedure (*b*), [nor in the power of delaying justice,<sup>130</sup> or of deriving benefit from technical and formal matters of pleading.<sup>131</sup>] He has only the right of prosecution or defence in the manner prescribed, for the time being, by or for the Court in which he sues; and if statute alters that mode of procedure, he has no other right than to proceed according to the altered mode (*c*). The remedy does not alter the contract or the tort; it takes away no vested right; for the defaulter can have no vested right in a state of the law which left the injured party without,<sup>132</sup> or with only a defective, remedy. If the time for pleading were shortened, or new powers of amending were given, it would not be open to the parties to gainsay such a change; the only right thus interfered with being that of delaying or defeating justice; a right little worthy of respect (*d*).

§ 286. The general principle, indeed, seems to be that alterations in the procedure are always retrospective, unless there be some good reason against it (*e*). Where, for instance, the defendant pleaded to an action for a small sum, that the jurisdiction of the Court had been taken away by a Court of Requests Act, and that Act was repealed after the plea but before the trial; it was held that the

(*a*) Macaulay's Hist. Eng. vol. iii. 715; and vol. v. 43.

(*b*) *Per* Mellish, L. J., in *Costa Rica v. Erlanger*, 3 Ch. D. 69. See ex. gr. *The Dumfries Swab*. 63, and cases, sup., § 177; [*Berry v. Clary*, 77 Me. 482.]

<sup>130</sup> *People v. Tibbets*, 4 Cow. (N. Y.) 384, 392; *Hoffman v. Locke*, 19 Pa. St. 57.

<sup>131</sup> *Com'th v. Hall*, 97 Mass. 570, 574.

(*c*) See the judgments of Wilde, B., in *Wright v. Hale*, 80 L. J. Ex. 40; 6 H. & N. 27; and of Lord Wensleydale in *Atty.-Genl. v. Sillem*, 10 H. L. 704; 33 L. J. Ex. 227; and *per* James, L. J., in

*Warner v. Murdoch*, 4 Ch. D. 752.

<sup>132</sup> In *Turnpike Co. v. Com'th*, 2 Watts (Pa.) 433, the broad principle is asserted, that, wherever a right exists, but no remedy to enforce it, it is within the constitutional power of the Legislature to provide one.

(*d*) See ex. gr. *Cornish v. Hocking*, 1 E. & B. 602, 23 L. J. 142; *Dash v. Van Kleeck*, 7 Johns. (N. Y.) 503; *The People v. Tibbets*, 4 Cowen, (N. Y.) 392.

(*e*) See *per* Lord Blackburn in *Gardner v. Lucas*, 3 App. 603, and *Kimbray v. Draper*, L. R. 3 Q. B. 163.

plaintiff was entitled to judgment (*a*). When the Legislature gave a new remedy by the Admiralty Acts of 1840 and 1861, for enforcing rights in the Admiralty, those Acts were held to extend to rights which had accrued before the new remedy had been provided (*b*). So, the provision of the Common Law Procedure Act of 1852, s. 128, that the plaintiff might issue execution within six years from the recovery of a judgment, without revival of the judgment, was held to apply to a judgment which had been recovered more than a year and a day before the Act was passed, and which therefore could not have been put in force under the previous state of the law without revival (*c*). The enactment 6 & 7 Vict. c. 73, s. 37, which made attorneys' bills taxable, for work done out of Court, and which also provided that, from the passing of the Act, no attorney should bring an action for costs until a month after he had delivered his bill, was held to apply to costs incurred before the passing of the Act (*d*). On this principle, the 3 & 4 Will. 4, c. 42; s. 31, which provides that in actions brought by executors, the plaintiff shall be liable for costs, was held to apply to an action begun before the Act came into operation (*e*); and though Littledale, J. (*f*), and afterwards Parke, B. (*g*), disapproved of the decision, it appears to have been generally concurred in by the Courts (*h*). So, the Common Law Procedure Act of 1860, which deprives a plaintiff, in an action for a wrong, of costs, if he recovers by verdict less than five pounds, unless the judge certifies in his favor, was held to apply to actions begun before the Act had come into operation, but tried after (*i*);

(*a*) *Warne v. Beresford*, 2 M. & W. 848. [See ante, § 278.]

(*b*) *The Alexander Larsen*, 1 W. Rob. 288. See *The Ironsides*, Lush. 458; 31 L. J. P. M. & A. 129.

(*c*) *Boodle v. Davis*, 8 Ex. 351, 22 L. J. Ex. 69.

(*d*) *Binns v. Hey*, 1 Dowl. & L. 66; *Brooks v. Bockett*, 9 Q. B. 847; *Scadding v. Eyles*, Id. 858.

(*e*) *Freeman v. Moyes*, 1 A. & E. 338; *Pickup v. Wharton*, 2 C. & M. 405; *Grant v. Kemp*, Id. 636;

*Exp. Dawson*, L. R. 19 Eq. 433.

(*f*) 1 A. & E. 341.

(*g*) *In Pinhorn v. Sonster*, 8 Ex. 138, 21 L. J. 337.

(*h*) *Per* Channell, B., in *Wright v. Hale*, 30 L. J. Ex. 43; *per* Wood, V. C., in *Re Lord*, 1 K. & J. 90, 24 L. J. Ch. 145.

(*i*) *Wright v. Hale*, 6 H. & N. 227, 30 L. J. Ex. 40. [But see *Atkins v. Pitcher*, 31 Hun (N. Y.) 352, where, in the case of an appeal by a defendant from a justice's judgment to the county court.



and a similar effect was given to the County Courts Act of 1867, as regards giving security for costs (a). The provision which extended the time for making decrees nisi absolute from three to six months, applied to suit pending when the Act came into operation (b).

§ 287. [In this country, the general rule seems to be, in accordance with the English, that statutes pertaining to the remedy, *i. e.*, such as relate to the course and form of proceedings for the enforcement of a right, but do not affect the substance of the judgment pronounced,<sup>133</sup> and neither directly nor indirectly destroy all remedy whatever for the enforcement of the right,<sup>134</sup> are retrospective, so as to apply to causes of action subsisting at the date of their passage.<sup>135</sup> A few illustrations will serve to elucidate the application of this rule. A statute giving to plaintiff suing for purchase-money of land a lien thereon in the vendee's hands, and authorizing a proceeding in rem against the same in addition to a personal judgment against the defendant, was held to apply to causes of action existing at the date of the passage of the enactment;<sup>136</sup> and such was the construction of an act permitting attachments against foreign corporations;<sup>137</sup> of an act regulating suits against sheriffs;<sup>138</sup> of an act allowing mortgagors and mortgagees, when the mortgaged land is taken for public uses, to join in a petition for damages.<sup>139</sup>

before Sept. 1, 1880, when the existing code of New York went into effect, it was held that the costs were regulated by the old code. And see *Caldwell v. State*, 55 Ala. 133, ante, § 277.]

(a) *Kimbray v. Draper*, L. R. 3 Q. B. 160. See another instance in *Watton v. Watton*, L. R. 1 P. & M. 227.

(b) *Watton v. Watton*, 1 P. & M. 227.

<sup>133</sup> *Morton v. Valentine*, 15 La. An. 150.

<sup>134</sup> *Richardson v. Cook*, 37 Vt. 599.

<sup>135</sup> See *Sampeyreac v. U. S.*, 7 Pet. 222; *People v. Supervisors*, 63 Barb. (N. Y.) 85; *People v. Tibbets*, 4 Cow. (N. Y.) 384; *Matter of Beams*, 17 How. Pr. (N. Y.) 459; *Dobbins v. Bank*, 112 Ill. 553; *Lane v. Nelson*, 79 Pa. St.

407; *Lawrence R. R. Co. v. Mahoning Co.*, 35 Ohio St. 1; *Bish., Wr. L.*, § 84; and cases *infra*.

<sup>136</sup> *Excels. Manuf'g Co. v. Keyser*, 62 Miss. 155. Comp. ante, § 280.

<sup>137</sup> *Coosa River Steamb. Co. v. Barclay*, 30 Ala. 120.

<sup>138</sup> *Collier v. State*, 10 Ind. 58. The act, in this case, provided that "all rights of actions secured by existing laws may be prosecuted in the manner provided in this act," and repealed inconsistent provisions.

<sup>139</sup> *Wood v. Westborough*, 140 Mass. 403, so as to be applicable to a proceeding begun after the act took effect, though the land had been previously taken. The act is said to be remedial, and hence the construction.

Upon the same principle, an act authorizing justices of the peace to issue garnishee process was held applicable to judgments rendered before its enactment;<sup>140</sup> an act limiting the amount of the attorney-fee to be taxed upon the foreclosure of school fund mortgages, to a mortgage previously given;<sup>141</sup> an act forbidding a party who received money, etc., as a consideration for a contract made on Sunday to defend an action on the contract on that ground without restoring the consideration;<sup>142</sup> an act authorizing assignees of notes not negotiable to sue thereon in their own names, to assignments made before its passage;<sup>143</sup> a provision that judgment against the principal in an injunction bond shall conclude the surety also, to a bond executed before the act.<sup>144</sup> And so, an act dispensing, in order to a recovery upon an official bond, with the necessity of previously establishing a devastavit against the principal,<sup>145</sup> and an act changing the mode of appraising property for sale on the foreclosure of mortgages.<sup>146</sup> The various statutes authorizing married women to sue alone upon contracts<sup>147</sup> and for injuries done to their persons or characters, and making the damages recovered their separate property, have been construed to embrace causes of action arising before the passage of the act, where the suit was not commenced until after the same.<sup>148</sup> And acts extending the period of limitation for certain purposes, and waiving conditions prescribed by former acts in regard to, *e. g.*, the issuing of executions, have been permitted a retrospective operation clearly intended by them.<sup>149</sup> An act subjecting lands to sale upon execution for the satisfaction of judgments was held to

<sup>140</sup> Fisher v. Hervey, 6 Col. 16.

<sup>141</sup> Kossuth Co. v. Wallace, 60 Iowa, 508.

<sup>142</sup> Berry v. Clary, 77 Me. 482.

<sup>143</sup> Harlan v. Sigler, 1 Morr. (Ia.) 39; but not to the extent of excluding any defence that might have been made in suits thereon in the names of the payees: *Ibid.*

<sup>144</sup> Pickett v. Boyd, 11 Lea (Tenn.) 498.

<sup>145</sup> Winslow v. People, 117 Ill. 152.

<sup>146</sup> Jones v. Davis, 6 Neb. 83.

<sup>147</sup> Buckingham v. Moss, 40 Com. 461.

<sup>148</sup> Ball v. Bullard, 52 Barb. (N. Y.) 141; Logan v. Logan, 77 Ind. 558; Weldon v. Winslow, L. R. 13 Q. B. D. 784; Severance v. Civil Serv. Supply Ass'n, 48 L. T. N. S. 485. *Comp. contra:* Weldon v. Riviere, 53 L. J. Q. B. D. 448.

<sup>149</sup> See *Henchall v. Schmidt*, 50 Mo. 454; *Caperton v. Martin*, 4 W. Va. 138; such acts being regarded as affecting the remedy only: see *State v. Moore*, 42 N. J. L. 208; *Brewster v. Brewster*, 32 Barb. (N. Y.) 428. *Comp. ante*, § 279.

apply to judgments obtained upon contracts made before its passage.<sup>150</sup>

§ 288. **Effect of Acts Relating to Procedure only on Pending Proceedings.**—[Indeed, much of this kind of legislation is held to apply, not only to existing causes of action, but also to pending proceedings.<sup>151</sup> It is said, that an act dealing with procedure only applies, unless the contrary intention is expressed, to all actions falling within its terms, whether commenced before or after the enactment.<sup>152</sup> Thus, an act giving appeals from certain enumerated judgments and orders, applies to such judgments and orders made prior to its passage;<sup>153</sup> as does an act providing for the granting of summary relief, by the court or a judge at chambers, from an order, judgment, etc., of the court in certain cases;<sup>154</sup> and an act extending the time within which a garnishee in a justice's court may file his answer,<sup>155</sup> or limiting, by way of amendment to a former act prescribing no period, the right of appeal from township boards of equalization to sixty days after adjournment,<sup>156</sup> or imposing additional requirements upon parties applying for a change of venue.<sup>157</sup> So, an act enlarging the jurisdiction of the United States Circuit Court was held applicable to pending causes.<sup>158</sup> And the same operation was given to an act directing that, where a distributee of an intestate's estate is unable to give the security to refund required by it, the fund shall be put at interest upon secur-

<sup>150</sup> *Reardon v. Searcy*, 2 Bibb (Ky.) 202. But a subsequent act restricting the operation of the former one, to contracts made after its enactment was not permitted to affect the validity of a sale of land upon execution on a judgment upon a contract made before the passage of the original act, but before the enactment of the restricting one.

<sup>151</sup> See *Bish., Wr. L.* § 84; *Comp. ante*, § 282. See *Denman v. McGuire*, 2 Centr. Rep. 104, where proceedings begun under the N. Y. Code of Remed. Just. and continued under the Code of Procedure were held valid.

<sup>152</sup> *Singer v. Hasson*, 50 L. T. N. S. 326; *Larkin v. Saffarans*, 15

*Fed. Rep.* 147; *Koch's Est.*, 5 Rawle (Pa.) 338. See also *Indianapolis v. Imberry*, 17 Ind. 175.

<sup>153</sup> *McNamara v. R. R. Co.*, 12 Minn. 388. Compare, however, as to prospective operation of an act giving writ of error: *Kingsbury v. Sperry*, 119 Ill. 279, and post, § 290.

<sup>154</sup> *Bensley v. Ellis*, 39 Cal. 309. !

<sup>155</sup> *Willis v. Fincher*, 68 Ga. 444.

<sup>156</sup> *Slocum v. Fayette Co.*, 61 Iowa, 169. See ante, § 272, and post, § 289.

<sup>157</sup> *Lee v. Buckheit*, 49 Wis. 54. The new law took effect pending an appeal from an order changing the venue.

<sup>158</sup> *Larkin v. Saffarans*, 15 Fed. Rep. 147. See ante, § 271.

ity to be approved by the Orphans' Court;<sup>159</sup> to acts relating to amendments of affidavits and certification of such as are taken in another state;<sup>160</sup> to a statute regulating the investment of the proceeds of sale under judicial decree, the sale being made after, under a decree made before, the passage of the act;<sup>161</sup> and to acts giving the Government the right of peremptory challenge in criminal cases,<sup>162</sup> authorizing amendments of the defendant's name in indictments,<sup>163</sup> or changing the forms of procedure for the trial of offences.<sup>164</sup>

§ 289 [On the other hand, it has been said that proceedings already pending at the time of the enactment, even of statutes merely affecting remedies, are to be deemed exempt from their operation, unless a contrary intent appears;<sup>165</sup> and it has been accordingly held that a statute passed after the commencement of an action, changing the mode of procedure, has no application to such action;<sup>166</sup> that an act regulating the matter of review and new trials did not take away the right of review in pending actions, or where judgment had been rendered, but the time limited by the old law for review had not expired;<sup>167</sup> that an act regulating executions did not apply to judgments rendered before its passage;<sup>168</sup> and that an act directing that in all indictments for murder, the degree of the crime charged shall be alleged was not to be construed so as to apply to pending indictments to which the defendant had not yet pleaded.<sup>169</sup>]

§ 290. **Limits of this Rule.**—But the new procedure would be presumed inapplicable, where its application would prejudice rights established under the old (*a*); or

<sup>159</sup> Koch's Est., 5 Rawle (Pa.) 338.

<sup>160</sup> Rosenthal v. Wehe, 58 Wis. 621.

<sup>161</sup> Gill v. Wells, 59 Md. 492.

<sup>162</sup> Walston v. Com'th, 16 B. Mon. (Ky.) 15.

<sup>163</sup> State v. Manning, 14 Tex. 402.

<sup>164</sup> People v. Mortimer, 46 Cal. 114.

<sup>165</sup> Trist v. Cabenas, 18 Abb. Pr. (N. Y.) 143.

<sup>166</sup> Merwin v. Ballard, 66 N. C. 398.

<sup>167</sup> Rowell v. R. R. Co., 59 N. H. 85. Doe, C. J., doubting, and

Foster and Bingham, JJ., dissenting.

<sup>168</sup> Stiles v. Murphy, 4 Ohio, 316.

<sup>169</sup> State v. Smith, 38 Conn. 397.

And see Mabry v. Baxter, 11 Heisk. (Tenn.) 682, where it was held that an act giving joint defendants the right to sever, and one to have a change of venue to the county of his residence, could not constitutionally apply to pending causes, as being judicial and changing the remedy. See ante, § 282.

(*a*) Exp. Phoenix Bessemer Co., 45 L. J. Ch. 11.

would involve a breach of faith between the parties. For this reason, those provisions of the Common Law Procedure Act of 1854, s. 32, which permitted error to be brought on a judgment upon a special case, and gave an appeal upon a point reserved at the trial, were held not to apply where the special case was agreed to, and the point was reserved before the Act came into operation (*a*). Where a special demurrer stood for argument before the passing of the first Common Law Procedure Act, it was held that the judgment was not to be affected by that Act, which abolished special demurrers, but must be governed by the earlier law (*b*). The judgment was, in strictness, due before the Act, and the delay of the Court ought not to affect it.

[Where, however, a right has been only partially acquired under a statute, and remains inchoate at the time of enactment of another, changing the method of its prosecution and perfection, the procedure prescribed for that purpose by the latter must be pursued, or the right remain unperfected.<sup>170</sup> Thus, where a defendant's real estate was sold on execution in August, 1829, a statute then giving a creditor, who had a judgment which was a lien on the land, fifteen months to redeem, upon payment of the amount of the bid, and ten per cent. interest thereon; and before November, 1830, when said period would, under the law in force at the time of the sale, have expired, a body of revised statutes went into effect, superseding the former statute upon this subject, and requiring, for redemption by a creditor, the payment of the bid with seven per cent. interest, but also requiring him to produce to the sheriff a certified copy of the docket of his judgment; it was held that, whilst the purchaser remained entitled to receive the amount of his bid with ten per cent. interest, his right thereto having vested in him before the revised statutes went into effect,

(*a*) *Hughes v. Lumley*, 24 L. J. Q. B. 29; 4 E. & B. 274. *Vansittart v. Taylor*, 4 E. & B. 910, 24 L. J. Q. B. 198. See sup. note 153.

(*b*) *Pinhorn v. Sons'ar*, 21 L. J. Ex. 336, 8 Ex. 138. See also *R. v. Crowan*, 14 Q. B. 221; *Hobson v. Neale*, 8 Ex. 181, 22 L. J. 25, 179. [And see ante, § 282. A provision,

that "demurrers for formal defects are abolished, and those only for substantial defects are allowed," was held to abolish special, but to preserve general demurrers: *Hobbs v. R. R. Co.*, 9 Heisk. (Tenn.) 873.

<sup>170</sup> *People v. Livingstone*, 6 Wend. (N. Y.) 526. See ante, § 281.

the omission of the creditor to produce the certificate required by the latter was fatal to his claim to succeed to the rights of the purchaser.<sup>171</sup>

§ 291. **Curative and Declaratory Laws.**—[However earnestly the policy of all retrospective legislation may, upon principle, be deprecated, it is undoubtedly true, that, "our legislatures are constantly passing laws of a retrospective character. Such are the laws declaring certain acts of persons irregularly elected, valid; correcting assessment rolls irregularly made; and many others of like character. These laws have never been questioned; and the denial of the power would, in a new country, where forms are often overlooked, lead to very serious consequences."<sup>172</sup> It cannot, of course, be the purpose of this work, to examine into the question of the constitutionality of such acts in general, or under particular constitutional provisions affecting special legislation, and the like; nor to inquire whether the plea of infancy which has been put forward in so many instances to justify departures from sound principles of economics as well as of jurisprudence, can, at the present day, be entitled to respect, at least in those states which may be supposed to have arrived at a stage of civilized development subjecting their institutions, legislation and policy to rules and criticisms beyond the immunities of the pinafore. It is a proposition too well settled by authority to admit of dispute, or call for extended discussion, that curative acts, especially upon matters of public concern, are to be allowed the retroactive effect they are clearly intended to have, even though vested rights and decisions of courts be set aside by them, so long as they do not undertake to infuse life into proceedings utterly void for want of jurisdiction,<sup>173</sup> and do not contravene the constitutional provisions against laws impairing the obligation of contracts and ex post facto laws, or any other provision of the particular constitution to which the Legislature passing them may be subject.<sup>174</sup> The

<sup>171</sup> *People v. Livingstone*, supra.

<sup>172</sup> *Sedgw.*, p. 134, citing *Syracuse City B'k v. Davis*, 16 Barb. (N. Y.) 188; 1 Kent, Comm., \*455.

<sup>173</sup> See *Cooley*, Const. Lim.,

\* 381-2; *Richards v. Rote*, 68 Pa. St. 248; *Halderman v. Young*, 107 Id. 324, 326. But see *Grim v. Sch. Distr.*, 57 Pa. St. 433.

<sup>174</sup> See *Otoe Co. v. Baldwin*, 111 U. S. 1; *Underwood v. Lilly*, 10

purpose of these sections is merely to point out the effect, upon the construction of such, and acts declaratory of former statutes or rules of law, of the presumption against an intention to legislate retrospectively, and possibly of a constitutional prohibition against retrospective operation in the particular class of cases to which the act is to be applied, coupled with the necessity of giving, if practicable, a lawful and reasonable operation to the expression of the legislative will.

§ 292. [If possible, such legislation will be regarded as intended only to lay down a rule for future cases.<sup>176</sup> Thus, a resolution of the Legislature validating the acts of certain officers performed before institution of a suit pending at the adoption of the resolution, was held not to be available in it unless a purpose which would make it so was expressed in the same.<sup>177</sup> Statutes declaring the act of a notary public, after expiration of his office, valid,<sup>177</sup> and that tax sales shall not be set aside on account of certain defects in the notice<sup>178</sup> were alike held applicable to future cases only. An act declaring that a certain notice required by another act to a city of a defect "shall not be deemed invalid" because of "any inaccuracy [not intended to mislead] in stating the time, place, or cause of the injury," was held inapplicable to a notice given before, though controlling in the case of notices given after, the enactment.<sup>179</sup> So, it was held that a legislative declaration that the provisions of an earlier act "authorizing a married woman to carry on any trade or business on her sole and separate account, shall be so construed as not to allow her to enter into co-partnership in business with any person," in legal effect declared, that, thereafter, no married woman should have that right or power.<sup>180</sup> So, an act declaring that a previous act should not

Serg. & R. (Pa.) 97; Com'th v. Marshall, 69 Pa. St. 328; Lane v. Nelson, 79 Id. 407; Spinning v. Build'g, etc., Ass'n, 26 Ohio St. 483; King v. Course, 25 Ind. 202; Sedgwick, pp. 141-144, and note *Curative Statutes*. See also ante, § 284, note 123.

<sup>176</sup> See *Journeay v. Gibson*, 56 Pa. St. 57, 61. *Lambertson v. Hogan*, 2 Id. 22; *McNichol v. U.*

*S.*, etc., Agency, 74 Mo. 457.

<sup>177</sup> *Linn v. Scott*, 3 Tex. 67.

<sup>177</sup> *Bernier v. Becker*, 37 Ohio St. 72.

<sup>178</sup> *Citizens' Gas Light Co. v. State*, 44 N. J. L. 648.

<sup>179</sup> *Shallow v. Salem*, 136 Mass. 136. And see *Forster v. Forster*, 129 Id. 559.

<sup>180</sup> *Todd v. Clapp*, 118 Mass. 495.

be construed as increasing the emoluments of certain officers "at the date of its passage."<sup>181</sup> And an act regulating the construction of certain doubtful expressions in wills, was held not to aid the construction of one taking effect before the enactment.<sup>182</sup> And this rule denying such statutes a retrospective, and restricting them to a prospective, operation is especially, it is said always,<sup>183</sup> to be observed, where the declaratory act undertakes to put a construction upon another act which has already received a different judicial construction.<sup>184</sup> Hence, an act legalizing a tax roll, and curing its defects, was construed as not affecting an existing judgment for trespass against officers for seizing and selling property to pay a tax thereunder;<sup>185</sup> nor an act legalizing an assessment, assessment roll and delinquent list, a judgment declaring the levy invalid.<sup>186</sup> And an act authorizing a corporation to do a thing it had already done, and validating the same, was held prospective only, and not affecting the rights of a plaintiff in litigation at the passage of the act.<sup>187</sup>

§ 293. [But, where such a construction is impossible, where the "language is plainly retrospective,"<sup>188</sup> whilst it must be given the effect it clearly is intended to have, it is not to be extended beyond the plain intent of the Legislature.<sup>189</sup> Thus, an act undertaking to validate a void assessment on a city lot for a street improvement was held, at all events, not

<sup>181</sup> *Bassett v. U. S.* 2 Ct. of Cl. 448. And see *Les Bois v. Bramell*, 4 How. 449, for similar construction of an act validating certain titles.

<sup>182</sup> *James v. Rowland*, 52 Md. 462. See ante, § 274. But compare *Adams v. Chaplin*, 1 Hill, Ch. (S. C.) 265, where an act declaring that no words of inheritance shall be necessary to convey a fee by devise, operated retrospectively; and ante, § 284.

<sup>183</sup> *Lambertson v. Hogan*, 2 Pa. St. 22.

<sup>184</sup> See *Ibid.*; *Kupfert v. Build'g Ass'n*, 30 Pa. St. 465; *Lincoln B. & S. Ass'n v. Graham*, 7 Neb. 173.

<sup>185</sup> *Moser v. White*, 29 Mich. 59.

<sup>186</sup> *People v. Moore*, 1 Idaho N. S. 662. But see ante, § 284, note, and *King v. Course*, 25 Ind. 202,

where, on March 4, 1865, a final judgment had been obtained enjoining county officers from issuing warrants to pay an unauthorized appropriation made by them; an act legalizing the appropriation having been passed on March 3, 1865, to take effect from and after its passage and publication in certain newspapers, which publication was made on March 4, 1865, it was held that the legalizing statute went beyond the judgment, validated the appropriation ab initio, and rendered the judgment erroneous. *Comp. Reis v. Graff*, 51 Cal. 86, post, § 293.

<sup>187</sup> *Cunningham's App.*, 108 Pa. St. 546.

<sup>188</sup> *Journeay v. Gibson*, 56 Pa. St. 57, 61.

<sup>189</sup> *Ibid.*, at p. 60.



to validate the same, by relation, as of the date when it was made, but only at the date of the passage of the act.<sup>190</sup> Yet, in so far as such statutes are remedial, they are to be construed as remedial statutes are;<sup>191</sup> so that an act which validated acknowledgments of deeds made before officers of other states, was held to embrace such an acknowledgment of a mortgage.<sup>192</sup>

§ 294. **Amendments.**—[It was declared in England that an act of Parliament made to correct an error of omission committed in a former statute of the same session, relates back to the time when the first act was passed, and the two must be taken together as though they were one and the same act, the first being read as containing in itself, in words, the amendment supplied by the last; so that goods *exported* before the second law passed, but only *shipped on board* before the first, of which the second was an amendment, was enacted, where liable to the duties imposed upon the *exportation* of goods.<sup>193</sup> This result would seem to flow logically from the theory formerly accepted that every statute commenced from the beginning of the session at which it was enacted,<sup>194</sup> and there is, therefore, nothing in it which would seem to give amendments, as such, a retroactive operation. And such is certainly not the proper understanding.<sup>195</sup> No doubt, a statute which is amended is thereafter, and as to all acts subsequently done, to be construed as if the amendments had always been there,<sup>196</sup> and the amendment itself so thoroughly becomes a part of the original statute, that it must be construed in view of the original statute as it stands after the amendments are

<sup>190</sup> *Reis v. Graff*, 51 Cal. 86. *Comp. King v. Course*, 25 Ind. 202, ante, § 292, note.

<sup>191</sup> *Journeay v. Gibson*, ubi supra.

<sup>192</sup> *Ibid.*

<sup>193</sup> *Atty.-Genl. v. Pougett*, 2 Price, 381, in *Potter's Dwaris*, p. 172.

<sup>194</sup> See post, § 497.

<sup>195</sup> See *Bish., Wr. L.*, § 152a.

<sup>196</sup> *Holbrook v. Nichol*, 36 Ill. 161; *Turney v. Wilton*, Id. 385; *Kamerick v. Castleman*, 21 Mo. App. 587; *People v. Sweetser*, 1

Dak. 308. And see *Ludington v. U. S.*, 15 Ct. of Cl. 453, where the act of 1875, to correct errors and supply omissions in the Rev. Stat., amending the same by adding certain provisions was held construable, not as a new enactment, but as if the Rev. Statutes had been originally adopted with the alterations thus made incorporated in them in their proper places, and that they were all subject to the provisions of §§ 5595 and 5601 of the Rev. Stat.

introduced, and the matters superseded by the amendments eliminated.<sup>197</sup> Hence, where certain amendments to an act gave justices of the peace concurrent jurisdiction with the common pleas "under the restrictions and limitations herein provided," this was held to refer to the restrictions and limitations provided in the original act as it stood after all the amendments made thereto were introduced into the same, in their proper places.<sup>198</sup> But even where the amendment merges portions of the original act in the new provisions,<sup>199</sup> so that, from the time of the amendment, the whole force of the enactment as to transactions subsequent to it rests upon it, the old act retaining no vitality distinct from the new one, it may yet be referred to as controlling past transactions;<sup>200</sup> and even an amendment of an act "so as to read" in a prescribed way has no retroactive force, but is to be understood as enacted when the amendment takes effect.<sup>201</sup> So, too, an amendment of a former law, the amendment declaring valid certain acknowledgments or probates of deeds, defective under the original act, was held not to be retroactive, so as to validate an acknowledgment, etc., defectively made under the latter before the passage of the amendment.<sup>202</sup>

<sup>197</sup> See *McKibben v. Lester*, 6 Ohio St. 627; *People v. Sweetser*, supra.

<sup>198</sup> *Ibid.* And see, for similar constructions, ante, § 196.

<sup>199</sup> See ante, § 195-196.

<sup>200</sup> *People v. Superv'rs, Montgomery*, 67 N. Y. 109; *Moore v. Mausert*, 49 Id. 332; *Goodno v. Oshkosh*, 31 Wis. 127.

<sup>201</sup> *Ely v. Holton*, 15 N. Y. 595; *Bay v. Gage*, 36 Barb. (N. Y.) 447; *Kelsey v. Kendall*, 48 Vt. 24; *Kamerrick v. Castleman*, supra. See *Burwell v. Tullis*, 12 Minn. 572, where, besides being decided that an amendment "so as to read" was not a repeal and re-enactment of

the provision amended: see ante, § 196; and that, in this respect it was immaterial whether the Legislature incorporated the old law and the amendment into one section, or in terms declared the provision added an amendment or addition, it was held, that, in this particular case, the amendment, upon all the grounds of construction, was to be deemed as evincing a design to operate retroactively.

<sup>202</sup> *McEwen v. Bulkley's Lessee*, 24 How. 242. The court held the effect of the amendment to be merely to provide an additional mode of probate; "nor does the act go any further:" *Ibid.*, p. 244.

## CHAPTER XI.

## EXCEPTIONAL CONSTRUCTION TO EFFECTUATE LEGISLATIVE INTENT.

- § 295. Effect to be given to True Intent of Act.    Modification of Language.
- § 297. Acts done "under," "by virtue of," "in pursuance of," etc., statute.
- § 298. Interpolation of Words, etc.
- § 301. Elimination of Words, etc.
- § 303. "Or" read "and."
- § 304. "And" read "or."
- § 305. Limits of Interchangeableness of "and" and "or."
- § 306. Permissive Words when, and when not, Read as Imperative.
- § 315. Effect of Express Reference to Discretion.
- § 317. Correction of Omissions and Erroneous Insertions.
- § 318. Elliptical Sentences.    Transposition of Words, etc.
- § 319. Clerical Errors.
- § 320. Equitable, in the sense of Liberal, Construction.
- § 322. Equitable Construction in its Strict Sense.
- § 323. Reason for such Construction in Ancient Statutes.
- § 324. Equitable Restriction of Modern Statutes.
- § 325. Principle of Equitable Construction Discredited.
- § 326. When Established Equitable Construction of One Statute Applied to Another.
- § 327. Adoption of Principle from Analogy to Statute
- § 328. Acts Contrary to Natural Equity, etc.

§ 295. **Effect to be Given to True Intent of Act.    Modification of Language.**—Where the language of a statute, in its ordinary meaning and grammatical construction, leads to a manifest contradiction of the apparent purpose of the enactment, or to some inconvenience or absurdity, hardship or injustice, presumably not intended, a construction may be put upon it, which modifies the meaning of the words, and even the structure of the sentence (*a*). This is done, sometimes, by giving

(*a*) See *per* Alderson, B., in *Atty-Genl. v. Lockwood*, 9 M. & W. 398, and *Miller v. Salomons*, 7 Ex. 475, 21 L. J. 188; *per* Parke, B., in *Becke v. Smith*, 2 M. & W. 195; *Wright v. Williams*, 1 M. & W. 99; and *Hollingworth v. Palmer*, 4 Ex. 267; *per* James, L. J., in *Exp. Rashleigh*, 2 App. 13; *Grot. de B. & P.*, b. 2, c. 16, s. 12 (4). [But

an unusual meaning to particular words ; sometimes by altering their collocation ; or by rejecting them altogether ; or by interpolating other words ; under the influence, no doubt, of an irresistible conviction, that the Legislature could not possibly have intended what its words signify, and that the modifications thus made are mere corrections of careless language, and really give the true intention. [The ascertainment of the latter is the cardinal rule, or rather the end and object, of all construction ;<sup>1</sup> and where the real design of the Legislature in ordaining a statute, although it be not precisely expressed,<sup>2</sup> is yet plainly perceivable, or ascertained with reasonable certainty, the language of the statute must be given such a construction as will carry that design into effect,<sup>3</sup> even though, in so doing, the exact letter of the law be sacrificed,<sup>4</sup> or though the construction be, indeed, contrary to the letter.<sup>5</sup> And this rule holds good even in the con-

in all these matters, it is necessary to remember, that, in the interpretation of a statute, the court must look to its language: *State v. Duggan* (R. I.), 3 New Engl. Rep. 137 ; that the words of a law are generally to have a controlling effect upon its construction: *Siemens v. Sellers*, 123 U. S. 276, 285 (although "the interpretation of those words is often to be sought from the surrounding circumstances and preceding history:" *Ibid.*, *per* Bradley, J., construing the phrase "17 years from the date of issue," in the act of Congress, relating to patents, of 2 March, 1861); and that, in giving construction to an act, in all ordinary cases, "courts are confined to the language and terms employed by the Legislature, and are not at liberty to interpolate phrases and provisions, although otherwise the purpose and intention of the law-making power may seem indefinite, obscure and incomplete:" *Furey v. Gravesend*, 104 N. Y. 405 ; 6 Centr. Rep. 501, 503.]

<sup>1</sup> *People v. Weston*, 3 Neb. 312 ; *Hunt v. R. R. Co.*, (Ind.) 11 West. Rep. 107.

<sup>2</sup> *State v. King*, 44 Mo. 283.

<sup>3</sup> *Brown v. Barry*, 3 Dal. 365 ; *Minor v. Mich. Bank*, 1 Pet. 46 ;

*Binney v. Canal Co.*, 8 Id. 201.

<sup>4</sup> *Tonnele v. Hall*, 4 N. Y. 140 ; *Kennedy v. Kennedy*, 2 Ala. 571 ; *Thompson v. State*, 20 Id. 54 ; *Sprowl v. Lawrence*, 33 Id. 674 ; *Big Black Creek, etc., Co. v. Com'th*, 94 Pa. St. 450 ; *Smith v. Randall*, 6 Cal. 47 ; *Exp. Ellis*, 11 Id. 222 ; *People v. Dana*, 22 Id. 11 ; *State v. Poydras*, 9 La. An. 165 ; *Simonds v. Powers*, 28 Vt. 354 ; *State v. King*, 44 Mo. 283 ; *Allen v. Parish*, 3 Ohio, 198 ; *Keith v. Quinney*, 1 Oreg. 364 ; *Reynolds v. Holland*, 35 Ark. 56. So, "the exact and literal wording of an Act may sometimes be rejected, if, upon a survey of the whole Act and the purpose to be accomplished, or the wrong to be remedied, it is plain that such exact or literal rendering of the words would not carry out the legislative intent:" *Bell v. New York*, 105 N. Y. 139 ; 7 Centr. Rep. 266, 268 ; and in the ascertainment of such purpose, the title may be regarded: *Ibid.*

<sup>5</sup> *People v. Utica Ins. Co.*, 15 Johns. (N. Y.) 358 ; *Jackson v. Collins*, 3 Cow. (N. Y.) 89 ; *Tonnele v. Hall*, 4 N. Y. 140 ; *Staniels v. Raymond*, 4 Cush. (Mass.) 314 ; *Ingraham v. Speed*, 30 Miss. 410 ; *New OrL., etc., R. R. Co. v. Hemp-*

struction of criminal statutes.<sup>6</sup> Of course, if the meaning of the Legislature is clear, every technical rule of construction must yield,<sup>7</sup> and though the words used to express that meaning be not apt for the purpose, they will be so construed as to serve the same.<sup>8</sup> And, a fortiori, if there is an express declaration of the intent and meaning of a statute by a provision in the same to carry out that intent, all other parts of the act are controlled in construction by it.<sup>9</sup> A clause, doubtful upon its grammatical construction, will be controlled by the general intent of the Legislature, rather than by the literal meaning of the language.<sup>10</sup>]

§ 296. In a case already mentioned (*a*), where a colonial ordinance, passed to give effect to the treaty between this country and China, authorized the extradition to the Chinese government of any of its subjects charged with having committed "any crime or offence against the laws of China," the Privy Council construed these words as limited to those crimes and offences which are punishable by the laws of all civilized nations; and as not including acts, which though "against the laws of China," would be innocent in Europe (*b*). When it was settled that the Statute of Limitations, 21 Jac. 1, c. 16, applied to India (*c*), it was necessary to construe, for that purpose, the expression "beyond the seas," as mean-

hill, 35 Id. 17; *Brown v. Wright*, 13 N. J. Eq. 240; *Big Black Creek, etc., Co. v. Com'th*, 94 Pa. St. 450; *Com'th v. Navigation Co.*, 66 Id. 81; *Com'th v. Fraim*, 16 Id. 163; *Bathurst v. Course*, 3 La. An. 260; *Com'l B'k v. Foster*, 5 Id. 516; *Ryegate v. Wardsboro*, 30 Vt. 746; *Canal Co. v. R. R. Co.*, 4 Gill & J. (Md.) 1; *Beall v. Harwood*, 2 Har. & J. (Md.) 167; *Riddick v. Governor*, 1 Mo. 147; *Erwin v. Moore*, 15 Ga. 361; *State v. R. R. Co.*, 2 Sneed (Tenn.) 88.

<sup>6</sup> *Daniels v. Com'th*, 7 Pa. St. 371, 373.

<sup>7</sup> *Oates v. Nat'l B'k*, 100 U. S. 239; *Wilkinson v. Leland*, 2 Pet. 627.

<sup>8</sup> *Crocker v. Crane*, 21 Wend. (N. Y.) 211.

<sup>9</sup> *Farmers' B'k v. Hale*, 59 N. Y. 53.

<sup>10</sup> *George v. B'd of Education*, 33 Ga. 344.

(*a*) Ante, § 29.

(*b*) *Atty.-Genl. v. Kwok Ah Sing*, L. R. 5 P. C. 197. As the literal meaning of the words was wide enough to include political offences against the law of a foreign State, an English Court might feel bound to think it impossible that they could have been used in that sense. But it might be doubted whether the other party to the treaty understood our stipulation in the same narrow sense; or, indeed, whether it did not understand it as including, above all others, those crimes which all governments are most desirous to punish, viz., those against themselves. The same wide expressions are used in the 34 Vict. c. 8, and in the 37 & 38 Vict. c. 38.

(*c*) *E. I. Co. v. Paul*, 7 Moo. 85.

ing out of the territories (a). The same Statute, which, after limiting the time for suing, gave a further period to persons abroad "after they returned," was construed as giving that extended time to the executor of a person who never returned, but died abroad (b). An Act which made it penal "to be in possession of game after the last day" allowed for shooting, would, if construed literally, include cases where the possession had begun before the last day, and therefore lawfully; and to avoid this injustice, it was construed as applying only where the possession did not begin until after the close of the season; that is, the words "to begin" were interpolated before "to be in possession" (c). Where one section enacted that if the plaintiff recovered a sum "not exceeding" five pounds he should have no costs, and another, that if he recovered "less than" five pounds, and the Judge certified, he should have his costs; the literal meaning of the last clause leaving it inoperative where the sum recovered was exactly five pounds, it was held, to avoid imputing so incongruous and improbable an intention to the Legislature, that the words "less than" should be read as equivalent to "not exceeding" (d). The Insolvent Act, which invalidated voluntary conveyances made by insolvents "within three months before the commencement of the imprisonment," which, literally, would exclude the time of imprisonment, was construed as if the words had been "within a period commencing three months before the imprisonment." The literal construction, in leaving uninvalidated voluntary conveyances made after the imprisonment had begun, would have led to an incongruity which the Legislature could not be supposed to have intended (e). The Bankruptcy Act of 1869, providing that all the property acquired by the bankrupt "during the continuance" of the bankruptcy should be divisible among his creditors, and providing also that he

(a) *Ruckmaboye v. Lullooboy*, 8 Moo. 4. [See ante, § 78, as to the construction of this phrase by the various courts in the United States.]

(b) *Townsend v. Deacon*, 3 Ex. 707; and see *Forbes v. Smith*, 11 Ex. 161.

(c) 2 Geo. 3, c. 19, 39 Geo. 3, c. 34; *Simpson v. Unwin*, 3 B. & Ad. 184.

(d) *Garby v. Harris*, 7 Ex. 591, 21 L. J. 160.

(e) *Becke v. Smith*, 2 M. & W. 198.

might obtain his discharge not only at the close, but during the continuance of his bankruptcy, it was held that the earlier passage must be read in substance as meaning that the future property which was to be divisible, was that acquired either during the continuance of the bankruptcy or before the earlier discharge of the bankrupt. This construction was deemed necessary to avoid leaving the bankrupt incapable of acquiring property after he had given up everything to his creditors, simply because the property had not been realized, and consequently the bankruptcy not closed (*a*).

§ 297. Acts done "under," "by virtue of," "in pursuance of," etc., statutes.—It is obvious that the provisions in numerous statutes which limit the time and regulate the procedure for legal proceedings for acts done "under" or "by virtue of," or "in pursuance" of their authority, do not mean what the words, in their plain and unequivocal sense, convey; since an act done in accordance with law is not actionable, and therefore needs no special statutory protection (*b*). Such provisions are obviously intended to protect, under certain circumstances, acts which are not legal or justifiable (*c*); and the meaning given to them by a great number of decisions seems, in the result, to be that they give protection in all cases where the defendant did, or neglected (*d*) what is complained of, under color of the statute; that is, being within the general purview of it, and with the honest intention of acting as it authorized, though he might be ignorant of the existence of the Act; and actually, whether reasonably or not, believing in the existence of such facts or state of things as would, if really existing, have justified his conduct (*e*). [Thus, where a tax-collector levied a tax on a

(*a*) 32 & 33 Vict. c. 71, ss. 15 & 48; *Ebbs v. Boulnois*, L. R. 10 Ch. 479.

(*b*) *Per Cur.* in *Hughes v. Buckland*, 15 M. & W. 346.

(*c*) See ex. gr. *Warne v. Varley*, 6 T. R. 443.

(*d*) *Wilson v. Halifax*, L. R. 3 Ex. 114, *Newton v. Ellis*, 5 E. & B. 115, 24 L. J. 337; ["anything done in pursuance of an act" thus including an omission: see ante, § 104.]

(*e*) See, among many other authorities, *Greenway v. Hurd*, 4 T. R. 553; *Parton v. Williams*, 3 B. & A. 330; *Roberts v. Orchard*, 2 H. & C. 769, 33 L. J. 65; *Hughes v. Buckland*, 15 M. & W. 346; *Booth v. Clive*, 10 C. B. 827, 2 L. M. & P. 283; *Carpue v. London and Brighton R. Co.*, 5 Q. B. 747; *Tarrant v. Baker*, 14 C. B. 199; *Burling v. Harley*, 3 H. & N. 271; *Hopkins v. Crowe*, 4 A. & E. 774; *Kine v. Evershed*, 10 Q. B. 143;

theatre, which had been erroneously assessed as a dwelling house, it was held, that, as the assessors were clothed with power to assess property according to the class, to which, in their judgment, it belonged, and consequently had jurisdiction of the subject-matter, the error did not withdraw the protection of the law from those acting as collectors under their authority.<sup>11</sup> So it was held, in Pennsylvania, that a justice of the peace, though he had acted illegally, as where he caused one who was traveling on Sunday to be arrested on his own view, yet, having general jurisdiction of the subject, and intending and assuming to act as a magistrate, was within the protection of the act entitling him to thirty days' notice of any action to be brought against a justice of the peace for anything done by him "in the execution of his office"<sup>12</sup>—a phrase which is said to mean "by virtue of his office."<sup>13</sup> If an Act authorizes the arrest of a person who entered the dwelling-house of another at night with intent to commit a felony (24 & 25 Vict. c. 96, s. 51), an arrest made in the honest and not unreasonable, but mistaken, belief that the person arrested had entered with that intent, would be protected. But the person making the arrest would not be protected if he had acted under a misconception, not of the facts, but of the law; as if, for instance, his belief was that the person arrested had only attempted to enter; a different offence, for which the enactment in question does not authorize arrest; or if, where the law justified an immediate apprehension, an arrest was made which was not immediate (*a*). [So, where a justice of the peace issued a warrant of arrest on a criminal accusation, without probable cause, supported by oath or affirmation, such power being expressly excepted from all the powers of Government by the bill of rights of Pennsylvania, he was held not protected by his office.<sup>14</sup>] The reasonableness of

*Hermann v. Seneschal*, 13 C. B. N. S. 392, 32 L. J. 43; *Downing v. Capel*, L. R. 2 C. P. 461; *Leete v. Hart*, Id. 3 C. P. 322; *Chamberlain v. King*, Id. 6 C. P. 474; *Selmes v. Judge*, Id. 6 Q. B. 724; *Mason v. Aird*, 51 L. J. Q. B. 244; *Dennis v. Thwaites*, 2 Ex. D. 21.  
<sup>11</sup> Sedgw., at p. 82, cit. *Henderson v. Brown*, 1 Cal. (N. Y.) 92.

<sup>12</sup> *Jones v. Hughes*, 5 Serg. & R. (Pa.) 302.

<sup>13</sup> *Mitchell v. Cowgill*, 4 Binn. (Pa.) 20.

(*a*) *Griffith v. Taylor*, 2 C. P. D. 194; *Morgan v. Palmer*, 2 B. & C. 729.

<sup>14</sup> *Johnson v. Tompkins*, 1 Baldw. 602.



the belief is immaterial, if the belief be honest; though it is an important element in determining the question of honesty.<sup>15</sup>

§ 298. *Interpolation of Words, etc.*—An Act (26 & 27 Vict. c. 29) which enacted that no witness before an election inquiry should be excused from answering self-criminating questions relating to corrupt practices at the election under inquiry, and entitled him, when he answered every question relating to those matters, to a certificate of indemnity declaring that he had answered all such criminating questions, was held to apply only where the witness answered “truly in the opinion of the commissioners;” for it was not to be supposed that any answer, however false or contemptuous, was equally intended (a). [So, where a statute required defendants in suits upon certain causes of action to file affidavits of defence setting forth the “nature and character thereof,” and in default of such affidavit, to be filed within a certain period, authorized the plaintiff to move for, and the court to enter, judgment against the defendant, it was held that the defence alleged must be set forth with such particularity as to satisfy the court that it was an available, practicable defence in the case, under the rules of law and evidence governing the same;<sup>16</sup> that the defendant must state that he believes, or show circumstances by his affidavit inducing the court to believe, that he will be able to prove the matters alleged by him upon the trial of the cause;<sup>17</sup> and that the defence thus specified must be such as would, if true, be legally sufficient to bar the plaintiff’s demand in the suit in which it is asserted.<sup>18</sup> It would not be supposed that the Legislature intended the assertion of any mere futile, impracticable, or irrelevant defence to answer the purpose of delaying the

<sup>15</sup> See, for an extended discussion of the subject of the protection given by statutes to those acting under their authority: Wilb., Stat. L., pp. 87–98. See also post, § 423.

(a) R. v. Hulme, L. R. 5 Q. B. 377. It is observable that this interpolation was made in the Act, notwithstanding that it repealed an earlier enactment which had protected the witness only when he

made “true” discovery.

<sup>16</sup> Heaton v. Horner, 35 Leg. Int. (Pa.) 146; 8 Pitts. L. J. N. S. 118. West Harrisburg, etc., Ass’n v. Morganthal, 2 Pears. (Pa.) 343; Leonard v. Fuller, 1 Penny. (Pa.) 387.

<sup>17</sup> Black v. Halstead, 39 Pa. St. 64.

<sup>18</sup> West v. Simmons, 2 Whart. (Pa.) 261; Rising v. Patterson, 5 Id. 316.

plaintiff's right to judgment, and of compelling him to go to trial; nor required the "nature and character" of the defence to be stated, unless the court was to pass upon its sufficiency as a defence.] The 374th section of the Merchant Shipping Act, 1854, which enacts that no license granted by the Trinity House to pilots "shall continue in force beyond the 31st of January," after its date, but that "the same may be renewed on such 31st of January in every year, or any subsequent day," was construed as meaning, not that the renewed licenses must be issued on or after that day, but that they should take effect from the 31st of January. This departure from the strict letter was justified by the great inconvenience which would have resulted from a rigid adherence to it, since it would have left the whole district for a certain period, probably days, possibly weeks, without qualified pilots (*a*).

§ 299. In the 7th section of the Railway and Canal Traffic Act of 1854, which enacts that railway and canal companies shall be liable for the loss or any injury done to "any horses, cattle or other animals" (which would include a dog) entrusted to them for carriage, with the proviso that no greater damages should be recovered for the loss of, or injury done to, "any of such animals" beyond the sums thereafter mentioned,—specifying certain sums for horses, neat cattle, sheep and pigs, but making no mention of dogs,—the proviso was read, in order to reconcile it with the enacting part, as dealing only with "any of the following of such animals" (*b*). [It has already been seen<sup>19</sup> that a statutory provision forbidding the granting of new trials for "any of the following" reasons, means, for "any one of the following" reasons.] Where a railway company was made liable to make good the deficiency in the parochial rates arising from their having taken rateable property, "until its works were completed and liable to assessment," the House of Lords held that the intention was that the liability should

(*a*) *The Beta*, 3 Moo. N. S. 23.

(*b*) *Harrison v. London & Brighton R. Co.*, 2 B. & S. 122, 29 L. J. 209; reversed on another point, *Id.*, and 31 L. J. 113; *R. v. Strachan*, L. R. 7 Q. B. 463. See

another instance of interpolation in *Perry v. Skinner*, 2 M. & W. 471, *sup.* § 278.

<sup>19</sup> *Thurston v. State*, 3 Coldw. (Tenn.) 115, *ante*, § 249.

cease as regards any one parish, as soon as that portion of the line which ran through it was completed ; in other words, that the Act was to read as fixing the liability when "its works *in the parish* were completed"(a). [Where a statute gave an action by any person in possession of realty against any person claiming an adverse "estate, interest, or lien therein," and by any person out of possession against any one claiming an adverse "estate or interest therein," it was held that the word "lien" should be read in the last provision also as having been intended, but omitted by oversight." Where to a statute prescribing that a person, on conviction of a certain offence, is to be imprisoned in the penitentiary not less than two, nor more than five, years, and a subsequent act adds the words "or by fine and imprisonment, one or both, at the discretion of the jury trying the same," the court is obviously required to supply, after the word "or" the words "be punished."<sup>21</sup> So, where a statute affixed to the commission of a certain offence a penalty of "not less than one nor more than three hundred dollars," it was held that the minimum penalty was one hundred dollars.<sup>22</sup> So, where an act made it the duty of the overseers of the poor of every district to furnish relief to every poor person within the same, not having a settlement therein, who should apply for relief, "until such person can be removed," it was intimated that the provision was to be read, "until such person can safely be removed," and that an attempt to remove him when in a condition of health making the removal a risk of his life, would lay the overseer open to indictment;<sup>23</sup> the warrant for this interpolation being the proper and reasonable effect of the word *can*. It has already been seen how the phrase "May 15, next" in a statute, was ascertained to mean, and read, "May 15 next thereafter."<sup>24</sup> In an act

(a) *East London R. Co. v. Whitechurch, L. R. 7 H. L., 89, sup. § 21.*

<sup>20</sup> *Donohue v. Ladd, 31 Minn. 244.*

<sup>21</sup> *Turner v. State, 40 Ala. 21.*

<sup>22</sup> *Worth v. Peck, 7 Pa. St. 268.* It may be questioned whether this construction amounted to an insertion of the word "hundred" after "one." No reason is given for the

decision. See § 414.

<sup>23</sup> *Kelly Tp. v. Union Tp., 5 Watts & S. (Pa.) 535, 536, per Gibson, C. J.*

<sup>24</sup> *Fosdick v. Perrysburg, 14 Ohio St. 472, ante, § 33.* Compare, also, as an instance of virtual interpolation: *Philadelphia v. Pass. Ry. Co., 102 Pa. St. 190, ante, § 142.*

making it penal to "buy, sell or receive from any slave," etc., the word "to" was interpolated to give effect to the word "sell."<sup>25</sup>]

§ 300. A case in the Queen's Bench may be cited as furnishing a remarkable example of judicial modification for the purpose of supplying an apparent case of omission, and avoiding an injustice and absurdity, such as the Legislature was presumed not to have intended. Under the 11 & 12 Vict. c. 110, an insolvent prisoner for debt might be discharged from imprisonment, either upon his own petition, or upon the petition of any of his creditors. The 10 & 11 Vict. c. 102, in abolishing the circuits of the Insolvent Commissioners, and transferring their jurisdiction to the County Courts, provided that "if an insolvent petitions," the Insolvent Court should refer his petition to the court of the district where he was imprisoned; but it omitted all mention of cases where the petitioner was a creditor. The court, however, considered that an intention to include the latter sufficiently appeared. To confine the section to its literal meaning would involve the unjust result that, though a vesting order might be made, and the debtor be deprived of his property, he would remain imprisoned. The words "if an insolvent petitions" were accordingly understood to have merely put that case as an example of the more general intention, viz., "if a petition be presented." For the purposes of the Legislature, it was immaterial whether the petition was the insolvent's or the creditor's (*a*). [And an instance, scarcely less remarkable, of the virtual insertion of words in an act imposing taxation, is the decision, already more than once referred to, of the Supreme Court of Pennsylvania, upon the act of April 24, 1874, which refers to corporations doing business in the state, and possessing "the

<sup>25</sup> *Worrell v. State*, 12 Ala. 732. Under a statute requiring sales of land for taxes to be made on the second Monday succeeding the term at which judgment was obtained, a sale on the second Monday succeeding the first day of the term was held a compliance with the requirement: *Bestor v. Powell*, 7 Ill. 119. This, however, was not an interpolation of the

words "first day of," but an application of the technical rule that a term is to be regarded in law as one day; so that a sale on the second Monday succeeding the adjournment of the term would have been equally a compliance with the statute: *Ibid*.

(*a*) *R. v. Dowling*, 8 E. & B. 605; *Exp. Greenwood*, 27 L. J. 28. S. C.

corporate right or privilege to mine, or to purchase and sell coal." It was held that the object of the law was to "reach every corporation which purchases and sells coal, which mines coal on its own land or land it has leased, or which causes coal to be mined under a lease, contract, grant or mining privilege, to unincorporated persons on property that it owns, or has a coal privilege or interest therein." Accordingly, it was held to embrace a corporation which owned extensive coal lands and leased them to others to be worked, the corporation itself, by its charter, being expressly prohibited from mining.<sup>26</sup>]

§ 301. **Elimination of Words, etc.**—Again, notwithstanding the general rule that full effect must be given to every word, if no sensible meaning can be given to a word or phrase, or if it would defeat the real object of the enactment, it may, or rather it should, be eliminated (*a*). The Carrier's Act, 1 Will. 4, c. 68, which enacts that a carrier shall not be responsible for the loss of articles delivered for carriage, unless the sender declares their value and nature, at the time of delivery, "at the office" of the carrier, was held to protect the carrier, where the parcel had been delivered to his servant elsewhere than at the office, and no declaration had been made either there or elsewhere; the fair meaning of the statute, and the paramount object of the Legislature being that the carrier should in every case be apprised of the nature and value of the article entrusted to him, whether it was delivered at the office or elsewhere (*b*). An Act (25 & 26 Vict. c. 114) which authorized constables to search any person whom they suspected of coming from any land in unlawful pursuit of game, and, if any game was found upon him, to detain and summon him, was held to authorize a constable to summon a man whom he saw on a footway, with a gun in his hand, picking up a rabbit thrown from an adjoining enclosure, just after the report of a gun, but whom he did not search. There was nothing in the general object of the Act to lead to the supposition that

<sup>26</sup> Big Black Creek, etc., Co. v. Com'th, 94 Pa. St. 450, 455.

(*a*) *Per* Lord Abinger in Lyde v. Barnard, 1 M. & W. 115; *per* Brett, L. J., in Stone v. Yeovil, 1 C. P.

D. 701; though in that case the elimination was not necessary, 2 C. P. D. 99.

(*b*) Baxendale v. Hart, 6 Ex 769, 21 L. J. 123; *per* Cam. Scac.

"the enormous absurdity" of requiring an actual bodily search under such circumstances was intended; and such a departure from the language of the Act was therefore considered as really meeting the true intention (*a*). So, the 35 Geo. 3, c. 101, which empowered justices to suspend, in case of sickness, the order of removal of any pauper who should be "brought before them for the purpose of being removed," was construed as authorizing such suspension without the actual bringing up of the pauper before the justices; as the literal construction would have defeated the humane object of the enactment (*b*).

§ 302. [Similarly, words have been rejected as surplusage in the following instances. Where a statute provided for an indictment "on conviction" of bribery, the words "on conviction," which, if retained, would have made the act nugatory, were rejected upon the construction of the act;<sup>27</sup> so the word "such," where it was apparent that it had no reference to anything preceding it;<sup>28</sup> so, in an act providing a punishment "if any guardian of any white female under the age of eighteen years, or of any other person to whose care or protection any such female shall have been confided, shall defile her," etc., the word "of" before "any other person;"<sup>29</sup> so, in a statute intended to confer jurisdiction, the word "not," which, if retained, would have rendered the act meaningless.<sup>30</sup> So, a clause purporting to define the meaning of "obligation or other security of the United States" as used in other parts of the act was applied to the terms "obligation" and "security" actually used, those portions of the phrase not appearing in any other part of the statute being, in effect, rejected as surplusage.<sup>31</sup> And where an act gave, and regulated the exercise of, the right of appeal from the judgment of a justice of the peace, and then provided, that, "upon such appeal from the decision, determination or order of two justices," etc., it was held that the word "two," in

(*a*) *Hall v. Knox*, 4 B. & S. 515, 33 L. J. M. C. 1. See also sup. §§ 245, 264. But in *Clarke v. Crowder*, L. R. 4 C. P. 638, and *Turner v. Morgan*, L. R. 10 C. P. 587, the statute was construed strictly and literally.

(*b*) *R. v. Everdon*, 9 East, 101.

<sup>27</sup> *U. S. v. Stern*, 5 Blatchf. 512.

<sup>28</sup> *State v. Beasley*, 5 Mo. 91.

<sup>29</sup> *State v. Acuff*, 6 Mo. 54.

<sup>30</sup> *Chapman v. State*, 16 Tex. App. 76 ante, § 265.

<sup>31</sup> *U. S. v. Rossvall'ey*, 3 Ben. 157.

view of the explicit reference to the appeal before given, which was distinctly an appeal from the judgment of a single justice, must have been inserted by mistake and was, therefore, rejected.<sup>32</sup> Where an amendatory act referred to the act intended to be amended by its date, title and subject-matter, a mistake in the first two was deemed immaterial and the erroneous reference thereto simply rejected, the reference to the subject-matter being sufficiently precise to identify the amended act.<sup>33</sup> So, where the title of an act referred to, and its enacting clause extended the provisions of, "an act passed in 1839, ch. 205," etc., it was held to be a sufficient identification of the act of 1838, ch. 205, which was passed in March, 1839, especially as there was no act passed upon that subject at the session of 1839.<sup>34</sup> And so was a reference, in an act authorizing judgments for want of an affidavit of defence in suits, *inter alia*, upon "liens of mechanics and material men, under the act of 17 March, 1836," there having been an act upon that subject approved 17 March, 1806, and another, which took its place, approved 16 June, 1836, and the reference clearly being to the latter act.<sup>35</sup> So, again, an amendment, in terms, to § 293 of an earlier act, was construed as referring to § 296 of the same, the subject-matter of the amendment pointing out the latter section as the only one to which it could properly refer, and the alternative for such a construction being the nullification of the amendment.<sup>36</sup> Upon the same principle, in a reference by a statute to the vote of a town respecting division, etc., a wrong date, given as that of the election, will be rejected as surplusage, the reference to the vote, there having been only one, being otherwise sufficiently descriptive.<sup>37</sup> And where a statute,

<sup>32</sup> *McCahan v. Hirst*, 7 Watts (Pa.) 175. *Comfort v. Leland*, 5 Whart. (Pa.) 81; *Gue v. Kline*, 13 Pa. St. 60, 64.

<sup>33</sup> *Madison, etc., Plank Road Co. v. Reynolds*, 3 Wis. 287.

<sup>34</sup> *Pue v. Hetzell*, 16 Md. 539.

<sup>35</sup> *Bradbury v. Wagenhurst*, 54 Pa. St. 180, 183.

<sup>36</sup> *People v. King*, 28 Cal. 265. And see, to the effect, that, where it is apparent from an act that a reference in it to another is a mis-

take, and that a different act was intended to be referred to, effect will be given to this intention: *School Dir's Distr. No. 5 v. Sch. Dir's Distr. No. 10*, 73 Ill. 249; *Poock v. Lafayette Bldg. Ass'n*, 17 Ind. 357; *People v. Hill*, 3 Utah, 334. See also *Blake v. Brackett*, 47 Me. 28; *Gibson v. Belcher*, 1 Bush (Ky.) 145.

<sup>37</sup> *Shrewsbury v. Boylston*, 1 Pick. (Mass.) 105.

intended to validate a certain city ordinance, passed April 12, 1866, which had formerly been declared void by the Supreme Court of the state, in the preamble, referred to the ordinance as adopted on July 13, 1866, but also referred to its provisions and to the fact, the names, the term and the number of the case in which the decision of the court thereon had been rendered, and the purport and effect on the ordinance thereof, it was held that the subject-matter of the act was sufficiently identified plainly to correct the error in the date, *i. e.*, to warrant its rejection as surplusage.<sup>38</sup>]

§ 303. "Or," read "and."—To carry out the intention of the Legislature, it is occasionally found necessary to read the conjunctions "or" and "and," one for the other. [Indeed, those words are said to be convertible into each other, as the sense of the enactment and the necessity of harmonizing its provisions may require.<sup>39</sup>] The 1 Jac. 1, c. 15, which made it an act of bankruptcy for a trader to leave his dwelling-house "to the intent, *or* whereby his creditors might be defeated or delayed," if construed literally, would have exposed to bankruptcy every trader who left his home even for an hour, if a creditor called during his absence for payment. This absurd consequence was avoided, and the real intention of the Legislature, beyond reasonable doubt, effected, by reading "or" as "and"; so that an absence from home was an act of bankruptcy only when coupled with a design of delaying or defeating creditors (*a*). [So, in Mass. Gen. St., ch. 167, § 6, in the words "in a fictitious or pretended lottery," the word "or" is read "and," the whole phrase thus being construed as describing a single offence.<sup>40</sup> The same construction was put upon the same word in a statute defining burglary as to "break or enter;"<sup>41</sup> and in a statute

<sup>38</sup> Com'th v. Marshall, 69 Pa. St. 328, 332.

<sup>39</sup> State v. Brandt, 41 Iowa, 593; State v. Myers, 10 Id. 448; People v. Sweetser, 1 Dak. 308; Bish., Wr. L., § 243. But see Douglass v. Eyre, Gilp. 147, where it is said that "or" never means "and," but that, when clearly necessary, in order to give effect to a clause in a will or a legislative provision, "or" has been changed or re-

moved, and "and" substituted therefor.

(*a*) Fowler v. Padget, 7 T. R. 509. See also R. v. Mortlake, 6 East 37.

<sup>40</sup> Com'th v. Harris, 13 Allen (Mass.) 534.

<sup>41</sup> Rolland v. Com'th, 82 Pa. St. 306, 326. Comp. Blemer v. People, 76 Ill. 265; Vance v. Grey & Bush (Ky.) 656.



punishing persons who shall place obstructions in a water-course, whereby the “flow of water is lessened, or navigation impeded.”<sup>42</sup> And so, too, it was held, that, in an act requiring a certificate of consent of parent or parents, guardian, etc., to the marriage of minors, if such parent, etc., live within the province or can be consulted with, “or” must be read “and,” as it could not have been intended “to send the justice or other person on a voyage of discovery” to find the parent or guardian beyond the limits of the province.<sup>43</sup> The same construction was placed upon the word “or” in the California Civil Code, § 978, between the various clauses referring respectively to the undertaking for costs on appeal, and an undertaking for the stay of proceedings, thus making the undertaking for costs essential in all cases.<sup>44</sup> The married woman’s act of 1848, in Pennsylvania, contained a provision making a married woman liable upon her contracts for necessaries, providing, however, that judgment should not be rendered against her unless it should appear that the debt was “contracted by the wife, or incurred for articles necessary for the support of the family,” etc. It is obvious and was held that “or” must be read “and.”<sup>45</sup> In the construction of the act of Congress of 6 August, 1861, providing for the seizure and confiscation of property used in aid of the rebellion, and for its condemnation in the district or circuit courts of the United States having jurisdiction of the amount “or” in admiralty, it was held that “or” must be read “and.”<sup>46</sup>]

§ 304. “And” read “or”—The converse change was made in a turnpike Act which imposed one toll on every carriage drawn by four horses, and another on every horse, laden or not laden, but not drawing; and provided that not more than one toll should be demanded for repassing on the same day “with the same horses *and* carriages.” It was held that the real intention of the Legislature required that this “and”

<sup>42</sup> State v. Pool, 74 N. C. 402.

<sup>43</sup> Bollin v. Shriner, 12 Pa. St. 205, 206.

<sup>44</sup> McConky v. Alameda Co. Super. Ct., 56 Cal. 83.

<sup>45</sup> Murray v. Keyes, 35 Pa. St. 384, 391.

<sup>46</sup> Union Ins. Co. v. U. S., 6 Wall. 759. See also post, § 304, Foster v. Com’t, 8 Watts & S. (Pa.) 77.

should be read as “or,” and that a carriage repassing with different horses was not liable to a second toll. The toll was imposed on the carriage; and it was immaterial whether it was drawn by the same or different horses (*a*). The Statute of Charitable Uses, which speaks of property to be employed for the maintenance of “sick *and* maimed soldiers,” referred to soldiers who were either the one “or” the other, and not only to those who were both (*b*). [A provision in the fourth section of an act regulating the sale, etc., of liquors, that any person violating “the first and second sections of this act” shall forfeit, etc., was held to render a person liable for the violation of either the first or the second section, the same being of such a character as to make an infringement of either, an independent offence.” So, in a statute which was supplementary to another, and prescribed a punishment by “fine and imprisonment,” the word “and” was read “or,” such being the reading of the original act, and there being no indication, beyond the change of the conjunction, of a design to inflict the cumulated punishment.<sup>46</sup> But possibly the most striking illustration of the convertibility of these words is afforded by the construction put upon a Pennsylvania statute which declared that no publication outside of court respecting the conduct of the judges, officers of the court, jurors, witnesses and parties on a question pending before the court, should be a contempt punishable by attachment; but that the party aggrieved by such publication might proceed against the “author, printer *and* publisher,” or either of them, by indictment; *or* he might bring an action at law and recover such damages as a jury might think fit to award. It was held that the word “and” should be read “or,” so as to give an indictment against all the several persons designated, as was, indeed, intimated to be the intention, by the addition “or either of them,” and not to convey the idea, as in grammatical strictness, the language would, that “author, printer and publisher,” (or, at least, “printer and pub-

(*a*) *Waterhouse v. Keen*, 6 Dowl. & R. 257, wrongly reported in the marginal note in 4 B. & C. 200.

(*b*) *Duke, Charit. Uses*, 134.

<sup>47</sup> *People v. Sweetser*, 1 Dak. 308.

<sup>48</sup> *Com'th v. Griffin*, 105 Mass. 185. See post, §§ 378, et seq.

lisher,”) were supposed to be one person; and that the word “or” should be read “and” so as to give the party injured both the right to prosecute and a right of civil action for damages, and to preclude the idea that the Legislature intended to give the injured party merely the choice between a criminal and a civil proceeding.<sup>49</sup>]

§ 305. **Limits of Interchangeableness of “and” and “or”**—This substitution of conjunctions, however, has been sometimes made without sufficient reason. It may be questioned, for instance, whether the judges who “were at the making” of the Statute 2 Hen. 5, c. 3, which required that jurors to try an action when the debt “or” damages amounted to forty marks, should have land worth forty shillings, were justified in construing it “by equity,” and converting the disjunctive “or” into “and” (*a*). The Court of Queen’s Bench, on one occasion, held that the power given to justices by the Highway Act, 5 & 6 Will. 4, c. 50, to order the diversion of a highway, when it appeared “nearer *or* more commodious to the public,” was limited to cases where the new road was both nearer *and* more commodious (*b*); but the same Court lately held that the power was exercisable when the new road was either the one *or* the other (*c*).

[It has been said, that in a penal statute, “and” can never be construed “or.”<sup>50</sup> It is sufficiently apparent from the illustrations already given, that both words are interchangeable, where the sense and objects of the enactment require the one to be substituted for the other, in penal statutes as well as in others, and as against the offender as well as in his favor.<sup>51</sup> But it need scarcely be repeated, that where the meaning of the act is plain, and there is nothing in it to call for the substitution, the court, in construing the act, is not at liberty to make it.<sup>52</sup>]

<sup>49</sup> Foster v. Com’t’h, 8 Watts & S. (Pa.) 77, *per* Gibson, C. J.

(a) Co. Litt. 272a.

(b) R. v. Shiles, 1 Q. B. 910.

(c) R. v. Phillips, L. R., 1 Q. B. 648; Wright v. Frant, 4 B. & S. 119, 32 L. J. M. C. 204. See Harrington v. Ramsay, 8 Ex. 326, 22 L. J. 460; Oldfield v. Dodd, 8 Ex. 578.

<sup>50</sup> U. S. v. Ten Cases of Shawls, 2 Paine, 162.

<sup>51</sup> See, also, to same effect, State v. Myers, 10 Iowa, 448, where an act punishing a person for counterfeiting *and* having in his possession, etc., was held to authorize a conviction for either; Bish., Wr. L., § 243.

<sup>52</sup> See ante, § 24.

§ 306. **Permissive Words when, and when not Read, as Imperative.**—Statutes which authorize persons to do acts for the benefit of others, or, as it is sometimes said, for the public good or the advancement of justice, have often given rise to controversy when conferring the authority in terms simply enabling and not mandatory. In enacting that they “may” or, “shall, if they think fit,” or “shall have power,” or that “it shall be lawful” for them to do such acts, a statute appears to use the language of mere permission; but it has been so often decided as to have become an axiom that in such cases, such expressions may have—to say the least—a compulsory force (*a*), and so would seem to be modified by judicial exposition. On the other hand, in some cases, the authorized person is invested with a discretion, and then those expressions seem divested of that compulsory force.

In an early case, where it was contended that the 13 & 14 Car. 2, c. 12, in enacting that the churchwardens and overseers “shall have power and authority” to make a rate to reimburse parish constables certain expenses, left it optional with them to make it or not, the Court held that it was obligatory on them to make it, whenever disbursements had been made and not been paid. “May be done,” it was observed, is always understood in such cases as “must be done” (*b*). So, where a statute directed that churchwardens should deliver their accounts to justices, and enacted that the latter “shall and they are hereby authorized and empowered, if they shall so think fit,” to examine the accounts, and disallow unfounded charges, it was held that the justices could not decline to enter upon the examination (*c*), or be at liberty to allow charges not sanctioned by law (*d*). [An act declaring that the supervisors of a county are “authorized to adjust and audit” certain claims, to allow the value of work shown to have been done, and to cause the amount to be levied and collected, was held to import an

(*a*) *Per cur.* in *R. v. Tithe Commrs.*, 14 Q. B. 474.

(*b*) *R. v. Barlow*, Carth. 293, 2 Salk. 209; *R. v. Derby*, Skin. 370. S. C.

(*c*) *R. v. Cambridge*, 8 Dowl. 89. comp. *R. v. Norfolk*, 4 B. & Ad. 238.

(*d*) *Barton v. Pigott*, L. R., 10 Q. B. 86; 44 L. J. M. C. 5.

imperative direction upon them to that effect ;<sup>53</sup> and such was the construction of an act which “authorized and empowered” those officers to cause taxes illegally assessed and paid in their county to be refunded, so that it become their duty to do so when truthful claims for such taxes were duly presented to them.” So, too, where cities and towns were “authorized and empowered” to make proper provisions for the support of the families of enlisted soldiers, and the means of raising the necessary funds for the purpose were provided.<sup>55</sup> Though the 11 & 12 Vict. c. 42, s. 9, enacts that justices “may” issue a summons on an information laid before them only “if they shall think fit,” it was held that they were not at liberty to refuse it on any extraneous considerations, such as that the prosecution was inexpedient (*a*). A charter which granted to the steward and suitors of a manor “power and authority” to hold a Court to hear civil suits, was held to make it obligatory to hold it when necessary (*b*). Again, the Tithe Commutation Act (5 & 6 Vict. c. 54, s. 7), which enacts that if any agreement for the commutation of tithes made before the Act, which was not of legal validity, should appear to the Tithe Commissioners to give a fair equivalent for the tithe, they “shall be empowered” to confirm it, or, if unfair, to confirm it nevertheless, and to award such a rent-charge as would make it a proper equivalent, and to extinguish the tithe ; it was considered that the Commissioners were bound to make any such agreement between the parties the basis of their own settlement, and were not at liberty to throw it wholly aside in carrying out the general policy of the Act, viz., tithe extinction (*c*).

§ 307. So, in *Blackwell's Case*, Lord Keeper North held,

<sup>53</sup> *People v. Superv'rs, Livingston*, 68 N. Y. 114 ; notwithstanding a prior act for a like purpose, which was in mandatory terms, had been vetoed on that account: *Ibid.* See to similar effect: *People v. Superv'rs, Erie*, 1 Buff. Super. Ct. (N. Y.) 517.

<sup>54</sup> *People v. Superv'rs, Otsego*, 36 How. Pr. (N. Y.) 1.

<sup>55</sup> *Veazie v. China*, 50 Me. 518 ;

*Milford v. Orono*, Id. 529.

(*a*) *R. v. Adamson*, 1 Q. B. D. 201 ; *R. v. Fawcett*, 11 Cox, 305. See *R. v. Lancashire JJ.*, L. R. 11 Q. B. D. 638.

(*b*) *R. v. Havering-atte-Bower*, 5 B. & A. 691 ; *R. v. Hastings*, Id. 692n., both better reported in 2 D. & R. 176, and 1 D. & R. 148.

(*c*) *R. v. Tithe Comm.*, 14 Q. B. 474.

and of the same opinion were all the judges, that the statute which enacted only that the Chancellor "should have full power" to issue a commission of bankruptcy against a bankrupt trader, on the petition of his creditors, imperatively required its issue; declaring that "may" was in effect "must" (a). Under the County Court Act, which enacted that the Superior Court "may" give the plaintiff the costs of his action, if he lived more than twenty miles from the defendant, it was held that the Court was bound to give them in every case in which the plaintiff and defendant dwelt more than that distance apart (b). The general Order which makes it "lawful" for the Court to order the production of such documents in the possession of a party relating to the action, "as the Court thinks right," gave the Court no discretion to refuse an inspection in any case where the documents were not privileged by law from inspection (c). An Act which made it "lawful" for a Court to stay proceedings in actions against companies under liquidation until proof of the plaintiff's debt (d); and one of the bankruptcy rules which provides that where the Court has given no directions as to the disallowance of the costs of improper or unnecessary proceedings, the taxing-master "may" look into the question, were held equally imperative (e). [So, it is said that the grant of power to amend implies the duty to exercise it in a proper case,<sup>56</sup> as the grant to the Orphan's Court of a power to direct an issue devisavit vel non, makes it a matter of right to the party demanding it in conformity with the statute to insist upon its exercise,<sup>57</sup> and the grant of authority, for certain specified causes, to allow a bill of review, leaves the court no discretion to refuse it where a

(a) 13 Eliz. c. 7; 1 Jac. c. 15; Blackwell's Case, 1 Vern. 152, 2 Ch. Ca. 190; Eq. Ca. Ab. 52.

(b) McDougal v. Paterson, 11 C. B. 755, 2 L. M. & P. 681; acc. Crake v. Powell, 2 E. & B. 210, overruling Jones v. Harrison, 6 Ex. 328.

(c) Judic. A. 1875, Ord. 31, r. 11; Bustros v. White, 1 Q. B. D. 423.

(d) Marson v. Lund, 13 Q. B. 614.

(e) Baines v. Wormsley, 47 L. J. Ch. 144; Add. rules, 1875, r. 18.

<sup>56</sup> Rehfuß v. Gross, 108 Pa. St. 521.

<sup>57</sup> Schwilke's App., 100 Pa. St. 628, under act 15 Apr. 1832. Not so, however, as to the power of that court under the act 29 Mar., 1832, to direct an issue to the common pleas, which is left a matter of discretion; Thompson's App., 103 Pa. St. 603.

case is made out under the statute.<sup>66</sup> Similarly, where an act allowed a court, upon application of the defendant in an ejectment suit, after recovery by plaintiff, to stay execution, where he shows valuable betterments, until their value is ascertained, he giving bond for damages and expenses, it was held that the court was obliged to grant the stay upon such application, etc.<sup>67</sup> And again, where an act allows a court, upon its own motion, or upon application, to set apart, for the use of the surviving husband or wife, etc., certain property, the exercise of the power is obligatory upon application.<sup>68</sup>] An Act which empowered a vestry to make a paving rate, and provided that when it appeared to the vestry that the rate was not incurred for the equal benefit of the whole parish, it "might" exempt the party not benefited, was held to impose a duty and not merely to confer a power on the vestry, to apportion the burden when the case arose (a).

§ 308. On the other hand, where it was enacted that "it should be lawful" for the Superior Courts to issue commissions to examine witnesses and parties abroad, it was held that the Court was not bound to issue such a commission simply on proof that the persons whose evidence was required were abroad, but that it was in the discretion of the Court to determine upon the special circumstances of each case, whether it was advisable in the interests of justice to issue it or not (b). So, under a statute which enacted that where a county bridge is narrow, "it shall and may be lawful" for the Quarter Sessions to order it to be widened, it was held, having regard to the nature of the Court entrusted with the power, and to the subject-matter, which might involve other considerations besides the width of the bridge, such as the cost of the proposed work and its possible disproportion to any public benefit likely to be derived from it, that it was discretionary to make the order or not (c). [So, an act providing that an offender "may" be

<sup>66</sup> Meckel's App., 112 Pa. St. 554.

<sup>67</sup> Johnson v. Tate, 95 N. C. 68.

<sup>68</sup> Exp. Ballentine, 45 Cal. 696.

(a) Howell v. London Dock Co., 8 E. & B. 212, 27 L. J. M. C., 177.

(b) 1 & 2 Wm. 4, c. 22; *Castelli v. Groom*, 18 Q. B. 490, 21 L. J. 308.

(c) 43 Geo. 3, c. 59; *Re Newport Bridge*, 2 E. & E. 377, 29 L. J. M. C. 52.

punished for grand larceny, although the value of the property stolen was within the limit of petty larceny, was held to confer a discretion.<sup>61</sup> Similarly, where it was provided that an indictment for polygamy "may" be found and tried in the county where the offender resides or where he is apprehended, it was held that the provision was not in derogation of the common law, but merely enlarged the jurisdiction, being permissive, not mandatory;<sup>62</sup> and upon the same understanding of the effect of that word, and no right or benefit to any one depending upon its construction as obligatory, it was held that an act providing that appeals from the judgment of the county court against lands for taxes, etc., "may" be taken to the Supreme Court, did not operate as an implied repeal of a former statutory provision giving an appeal in such case to the Circuit Court.<sup>63</sup> Again, the enactment that if part of the consideration for an annuity were returned, or paid in goods, or retained on any pretence, "it should be lawful" for the Court to cancel the annuity deed, if it should appear that "any such practices" had been used; the Court considered that this last expression limited the enactment to cases where any of the forbidden acts had been done *malo animo*, and held that it was in their discretion to set the deed aside or not (*a*). The Church Discipline Act, which enacts that in every case of a clergyman charged with an ecclesiastical offence, or concerning whom a scandal may exist of having committed such an offence, "it shall be lawful" for the bishop, on the application of any person complaining of it, or if he thinks fit, on his own motion, to appoint a commission to examine witnesses, to ascertain if there be sufficient *prima facie* ground for instituting further proceedings, was held to leave it discretionary with the bishop to appoint a commission, on receiving such a complaint. Having regard to the pre-existing state of the law, and the character of the bishop's office, it was considered that it was his duty, before issuing the commission, to determine on the expediency of instituting

<sup>61</sup> Williams v. People, 24 N. Y. 405.

<sup>62</sup> State v. Sweetser, 53 Me. 498.

<sup>63</sup> Fowler v. Pirkins, 77 Ill. 271.

(a) 5 Geo. 4, c. 14, s. 6; Barber v. Gamson, 4 B. & A. 281; Girdlestone v. Allen, 1 B. & C. 61.



the prosecution, taking into his consideration the nature, credibility, or importance of the charge, and the status, solvency, and religious character of the complainant, as well as the general interests of the Church (*a*).

§ 309. This subject underwent much discussion in the last-mentioned case, and elicited various views. The Queen's Bench held that it was imperative to issue the commission where a complaint had been made of an ecclesiastical offence (*b*). According to Lord Cairns, such words as "it shall be lawful," are always simply permissive (*c*) or enabling. They confer a power, and do not, of themselves, do more. But there may be something in the nature of the thing empowered to be done, something in the object for which it is to be done, something in the conditions under which it is to be done, something in the title of the persons for whose benefit the power is to be exercised, which may couple the power with a duty, and make it the duty of the person in whom the power is reposed to exercise it when called upon to do so; it lies on those who contend that an obligation exists to exercise the power, to show in the circumstances of the case something which, according to the above principles, created that obligation; and the cases decide only that where a power is deposited with a public officer for the purpose of being used for the benefit of persons who are specifically pointed out, and with regard to whom a definition is supplied by the legislature of the conditions upon which they are entitled to call for its exercise, that power ought to be exercised, and the Court will require it to be exercised (*d*). Lord Blackburn's opinion was that the enabling words gave a power which *prima facie* might be exercised or not; but that they were compulsory whenever the object of the power was to effectuate, not any object for the public good or of general interest or concern, but only a private legal right (*e*). Lord Justice Bramwell considered that a statute giving a power obviously meant that the power should be exercised; that where the conditions

(*a*) 3 & 4 Vict. c. 86; R. v. Chichester (Bp.) 2 E. & E. 209, 29 L. J. 23; R. v. Oxford (Bp.) 4 Q. B. D. 525; Julius v. Oxford (Bp.) 5 App. 214.

(*b*) 4 Q. B. D. 245.  
(*c*) 5 App. p. 223.  
(*d*) 5 App. p. 222.  
(*e*) Id. 244.

of those cases are always the same,—as where, for instance, the power to give costs depends on the single fact whether the plaintiff lived within twenty miles from the defendant,—the statute must mean that the power should be exercised in all those cases, and so is compulsory ; but that when the circumstances vary, the words empowering but not commanding are not obligatory (*a*).

§ 310. This last view, pointing evidently to the distinction between ministerial and judicial acts, suggests an explanation of the question which may be here offered.<sup>64</sup>

When a statute enacts that a candidate at an election “may” be present at a polling place, or that a clergyman accused of an ecclesiastical offence “may” attend the proceedings of the commission appointed to inquire into the accusation, or that a company “may” construct a railway (*b*), or that a plaintiff “may” sue in one action for injury done to his wife as well as to himself (*c*), [or “may” appeal to a certain court,<sup>65</sup>] it confers a privilege or license which the donee may exercise or not at pleasure, having only his own convenience or interests to consult ; and the word “may” is then plainly permissive only. But it would be difficult to believe that Parliament ever intended to commit powers to public persons for public purposes for exercise or non-exercise in any such spirit. An enactment that a court or person “may” swear witnesses (*d*) ; or that a justice “may” issue a summons on complaint of an offence, or the Chancellor a commission in a case of bankruptcy, is no mere permission to do such acts, with a corresponding liberty to abstain from doing them. Whenever the act is to be done for the benefit

(*a*) 4 Q. B. D. 553.

<sup>64</sup> This distinction is indicated in *Com'th v. Clark*, 7 Watts & S. (Pa.) 127, 133, *per* Gibson, C. J., in the construction of a provision contained in the schedule of a constitution. See § 536.

(*b*) *York v. N. Midland R. Co.*, 1 E. & B. 858, 22 L. J. 225 ; *Great Western R. Co. v. R.*, 1 E. & B. 874. See also *Nicholl v. Allen*, 1 B. & S. 934, 31 L. J. 283.

(*c*) *Brookbank v. Whitehaven R. Co.*, 7 H. & N. 834, 31 L. J.

349. [But, under *Conn. Gen. Stat.*, tit. 19, Ch. 5, § 11, which provided, that, when any married woman shall carry on any business, and any right of action shall accrue to her therefrom, she “may” sue upon the same as if unmarried, it was held that a suit could be brought only in her name : *Rockwell v. Clark*, 44 Conn. 534.]

<sup>65</sup> See *Fowler v. Pirkins*, 77 Ill. 271, ante, § 308.

(*d*) *Per Cockburn, C. J.*, in *R. v. Oxford (Bp.)* 4 Q. B. D. 245.

of others, the word "may," or any of its equivalents, simply confers a power or capacity to do the act. It is facultative, not permissive; and neither by its own connotation, nor by force of any legal principle, does it necessarily imply an option to abstain from doing the act. On the contrary, it is a legal, or rather a constitutional principle, that powers given to public functionaries or others for public purposes or the public benefit, are always to be exercised when the occasion arises. Whether this is to be done by the authorized persons on their own initiative, indeed, or only on the application of those who have a right to the exercise of the power, is a subordinate question, which may depend on the language or object of the statute, or on the constitution, whether executive or judicial, of the authorized body or persons, or of their course of practice. But as regards the imperative character of the duty, it was laid down by the King's Bench (*a*) that words of permission in an Act of Parliament, when tending to promote the general benefit, are always held to be compulsory; and as regards Courts and judicial functionaries, who act only when applied to, the same rule was in substance re-stated by the Common Pleas, in laying down that whenever a statute confers an authority to do a judicial act (the word "judicial" being used evidently in its widest sense), in a certain case, it is imperative on those so authorized to exercise the authority when the case arises, and its exercise is duly applied for by a party interested and having a right to make the application; and that the exercise depends, not on the discretion of the Courts or judges, but upon proof of the particular case out of which the power arises (*b*). The Supreme Court of the United States similarly laid it down that what public officers are empowered to do for a third person, the law requires shall be done whenever the public interest or individual rights call for the exercise of the power; since the latter is given not for their benefit, but for his, and

(*a*) *R. v. Hastings (Mayor)* 1 D. & R. 48.

(*b*) *McDougal v. Paterson*, 11 C. B. 755, 2 L. M. & P. 687. In some cases, this rule seems to have been overlooked, and the word "may" construed as simply per-

missive. See ex. gr. *R. v. Eye*, 4 B. & A. 271; *Jones v. Harrison*, 6 Ex. 328; *Bell v. Crane*, L. R. 8 Q. B. 481; *R. v. South Weald*, 5 B. & S. 391, 33 L. J. 193; *De Beauvoir v. Welch*, 7 B. & C. 266. See, also, *R. v. Norfolk*, 4 B. & Ad. 238.

is placed with the depositary to meet the demands of right, and prevent the failure of justice. In all such cases, the Court observed, the intent of the Legislature, which is the test, is, not to devolve a mere discretion, but to impose a positive and absolute duty (*a*).

§ 311. There is, therefore, abundant authority for the proposition that such powers as are here under consideration are invariably imperative; and that it is the duty of those to whom they are entrusted to exercise them whenever the occasion contemplated by the Legislature arises. And having regard to this implied duty, the enabling or facultative terms in which the power may be couched, such as "it shall be lawful," are to be regarded merely as the usual mode of giving a direction (*b*); as importing that it is not to be lawful to do otherwise than as directed (*c*).

This is free from doubt in all those cases adverted to by Lord Bramwell, where the conditions are always the same; for in those cases the Legislature has in effect prescribed the specific facts out of which, in the language of the Common Pleas, the power arises; and nothing is left to be determined or ascertained by the judicial discretion. Where the statute enacted that there should be power to levy a rate to pay the constables (*d*), or to issue a commission to administer a bankrupt estate (*e*), or that a plaintiff might have his costs when he lived a certain distance from the defendant (*f*), it left no other question open for consideration, in the exercise of the power; than whether the money was due to the constables; whether there was a bankrupt trader, a legal debt, and a petitioning creditor; or whether the plaintiff's and defendant's abodes were at the prescribed distances.

But the general rule applies equally to the other class of cases, where the power was discretionary; for the discretion which was given was not that of exercising the power, or not, at pleasure, when the occasion did arise, but only of deter-

(*a*) *Supervisors v. U. S.*, 4 Wallace, 435, 446.

(*b*) *Per Mellish*, L. J., R. v. Norfolk, *supra*, 265, and *per Jessel*, M. R., in *Ex parte Jarman*, 4 Ch. D. 838.

(*c*) *Per James*, L. J., in *Re Neath*

and *Brecon R. Co.*, L. R., 9 Ch. 264.

(*d*) *R. v. Barlow*, *sup.* § 306.

(*e*) *Blackwell's Case*, *sup.* § 307.

(*f*) *McDougal v. Paterson*, *sup.* § 810.

mining whether the occasion had arisen in the particular case; and this question did not turn on the character of the terms, whether enabling or mandatory, in which the power was conferred, but on the nature of one or more of the facts on which the exercise was to depend, and which could be determined only by the judicial discretion of the authorized person. If a statute empowered justices to adjudicate in certain cases, that is, to impose a certain penalty on persons whom they should find guilty of a certain offence, it is incontestable that they would have no option to decline the jurisdiction because the statute used only the word "may" instead of "shall" (a). Whether the language was facultative only, or mandatory, it would be equally obligatory on them to hear and determine the complaint, to decide, one way or other, whether the accused was guilty, and to impose the penalty if he was; and equally within their judicial discretion which way to find as to the guilt. If any doubt were possible on this point, it would be removed by supposing the power conferred on the justices, and the finding whether the occasion for its exercise had arisen, delegated to a jury. The distinction between a discretion to exercise the power, and a discretion to determine only whether the occasion for it has arisen, is illustrated by the construction of the enactment that justices may, if they think fit, issue a summons upon an information laid before them. This power is so far discretionary, that they may grant or refuse the summons according as they judge, in the honest exercise of their discretion (b), that a *prima facie* credible case is shown for it; but its exercise is imperative, in the sense that if their opinion is that such a case is shown, it is not competent to them to refuse to exercise it on extraneous grounds, such as that the prosecution is unadvisable (c). In the case of the annuity (d), the power, though couched in enabling terms only, would have been clearly imperative, if its exercise had depended only on the fact whether the whole consideration had been paid or not; but as the statute was construed to

(a) *R. v. Cumberland*, 4 A. & E. 695.

(b) See *sup.* § 147.

(c) *R. v. Adamson*, 1 Q. B. D. 201; *R. v. Fawcett*, 11 Cox, 305.

(d) *Barber v. Gamson*, *sup.* § 308.

require the further fact that the retention or return of part of the consideration had been done with a corrupt or fraudulent motive, the power was so far discretionary, as the finding of this particular fact was intrusted to, and, indeed, could be determined **only** by the judicial discretion of the Court. It could hardly be contended that if the Court had found that the motive was corrupt, it would still have been at liberty to abstain from cancelling the deed. So, as regards the power to order the examination of witnesses abroad (*a*), the power was discretionary, not because the language was merely enabling, but because the Legislature did not intend that the power should be exercised where injustice would result; and the decision of the Court that no such consequence was likely to ensue was a fact essential to the exercise of the power. So, in the Bishop of Oxford's case, though the power was widely discretionary as regards the question whether the occasion for its exercise arose, the Bishop could not have declined to hear the complaint (*b*); nor, if his own judicial discretion, uninfluenced by considerations foreign to his duty, had decided that the occasion for it had arisen, could he, consistently with the intention of the Legislature, have refused to issue the commission (*c*).

In one sense, indeed, a power is never obligatory when the discretion of its depositary is left to determine whether the occasion for its exercise has arisen; for a Superior Court can only require him to exercise his discretion, but cannot direct how he shall exercise it. But this may be recognized without admitting the principle, that, contrary to the rule laid down by the King's Bench and Common Pleas, it is ever discretionary to exercise a power given for a public purpose, in any case where the occasion for its exercise has arisen.

§ 312. The result seems to be, that, when a public power for the public benefit is conferred in enabling terms, a duty is impliedly imposed to exercise it whenever the occasion

(*a*) *Castelli v. Groom*, sup. § 308.

(*b*) *Per* Lord Blackburn, 5 App. 241.

(*c*) See the concluding remarks of Lord Justice Bramwell's judgment in 4 Q. B. D. 555.

arises. These terms are then, in effect, invariably invested with a compulsory force; and when a judicial discretion is found to be involved in the exercise of the power, this is not owing to the circumstance that the power is couched in the language of authorization only, and not of command, but because, according to the construction of the Act, it is intended by the Legislature that the power shall be exercised only when some fact is found to exist which can, from its nature, be ascertained only by the judicial discretion (a). [Since, therefore, a direction contained in a statute, though couched in merely permissive language, will not be construed as leaving compliance optional, where the good sense of the entire enactment requires its provisions to be deemed compulsory,<sup>66</sup> it is evident that the question is, in every case, one of intention." And the intent is to be judged of by the purposes of the statute. Where those purposes are to provide for the doing of something for the sake of justice;<sup>67</sup> something which concerns the public rights or interests, and for the doing of which the public has a claim *de jure*;<sup>68</sup> something which concerns and subserves third parties, and for the doing of which they have a claim based upon existing rights;<sup>69</sup> and, of course, where the thing to be done concerns and subserves rights both of the public and of individuals,"

(a) It has been said that this principle does not apply to the construction of a by-law purporting to authorize its makers to do an act for the public benefit. It was not to be supposed that they intended to bind themselves by their own by-law: *R. v. Eye*, 2 D. & R. 172; *per* Abbott, C. J., and Bayley, J., 175.

<sup>66</sup> See *People v. Brooklyn*, 22 Barb. (N. Y.) 404.

<sup>67</sup> See *Supervisors v. U. S.*, 4 Wall. 435, 436; *Ritchie v. Franklin Co.*, 22 Id. 67; *Thompson v. Carroll*, 22 How. 422; *Minor v. Mech. B'k*, 1 Pet. 46; *Apperson v. Memphis*, 2 Flap. 363; *Kellogg v. Page*, 44 Vt. 356.

<sup>68</sup> See *People v. Supervisors*, 51 N. Y. 401; *Phelps v. Hawley*, 52 Id. 23; *Exp. Simonson*, 9 Port. (Ala.) 390; *Exp. Banks*, 28 Ala. 28; *Johnson v. Tate*, 95 N. C. 68, ante,

§ 307.

<sup>69</sup> See *Fowler v. Pirkins*, 77 Ill. 271; *Schuyler Co. v. Mercer Co.*, 9 Id. 20; *Supervisors v. U. S.*, 4 Wall. 435; *Mason v. Fearson*, 9 How. 248; *Kennedy v. Sacramento*, 10 Sawyer, 29; *Ralston v. Crittenden*, 3 McCrary, 332; *Newburgh, etc., Turnp. Co. v. Miller*, 5 Johns. Ch. (N. Y.) 114; *People v. Supervisors*, 11 Abb. Pr. (N. Y.) 114; *Seiple v. Elizabeth*, 25 N. J. L. 407; *Com'th v. Marshall*, 3 W. N. C. (Pa.) 182; *Norwegian Str.*, 81 Pa. St. 349; *Cutler v. Howard*, 9 Wis. 309; *Blake v. R. R. Co.*, 39 N. H. 435; *Nave v. Nave*, 7 Ind. 122; *Bansemmer v. Mace*, 18 Id. 27; and cases in preceding note.

<sup>70</sup> See *Ralston v. Crittenden*, 3 McCrary, 332; 13 Fed. Rep. 508; and cases in preceding notes.

<sup>71</sup> See *People v. Supervisors*, 11 Abb. Pr. (N. Y.) 114.

—in all these cases, an intent is to be inferred, that, in using a permissive phrase, the Legislature really meant to enjoin an imperative duty. But, where there is no design manifest to do something required by the purposes of justice ; where the public has no interest or concern with the execution of the powers conferred ; and where no private rights are affected by its failure, there is no room for an inference that the Legislature, in using permissive language, intended that it should be given a compulsory significance, but, as will hereafter appear,<sup>73</sup> it is even reasonable to suppose that in using language mandatory in its strict grammatical sense, it attached to it the meaning and effect of permissive words only.

§ 313. [A few illustrations will serve to elucidate the application of these principles, if, indeed, the instances of its operation cited in previous sections may not be deemed sufficient. An act directing the treasurer of a state to pay the members of its Legislature in gold coin, is mandatory upon him.<sup>74</sup> But after the famous legal tender decision of May, 1871,<sup>75</sup> an authority conferred by legislative resolution upon the state treasurer to pay certain bonds maturing in June, 1871, in coin was held not to be obligatory upon him.<sup>76</sup> Those who demanded payment in coin had no *de jure* claim to require it, when the bonds fell due, since it was ruled by the highest authority in the land that justice did not require the payment of honest debts in honest money.

[Where a statute provided that a court “may” appoint three commissioners to settle a disputed line between certain towns ;<sup>77</sup> or “may,” before incurring an expense, submit the question to the people,<sup>78</sup> the word “may” was clearly intended to mean “shall ;” for, in each case, the public interest was involved, and neither could, in the one, the towns agree to the appointment of a lesser number of commissioners, nor in the other, the court dispense with a popular vote. But

<sup>73</sup> See post, §§ 316, 431 et seq.

<sup>74</sup> *People v. Beveridge*, 38 Ill. 307 ; provided the coin was in the treasury when the warrants were presented.

<sup>75</sup> *Knox v. Lee*, 12 Wall. 457,

reversing *Hepburn v. Griswold*, 8 Id. 603.

<sup>76</sup> *Kellogg v. Page*, 44 Vt. 356.

<sup>77</sup> *Monmouth v. Leeds*, 76 Me. 28.

<sup>78</sup> *Steines v. Franklin Co.*, 48 Mo. 167.



an act which provided that it might be lawful to deliver the tax-list to a certain officer, a previous act having made it deliverable to another, for collection, was not deemed of such consequence to the public, or to the individuals who had to pay the taxes, as to require a construction which would make "may" equivalent to "must," but to leave the matter resting in sound discretion.<sup>78</sup>

§ 314. [An act authorizing the officers of a city to levy an annual tax of one per centum, part of which was to be set aside to pay the bonds of the funded debt of the municipality, was clearly mandatory.<sup>79</sup> It subserved, not only the public interest, but directly the subsisting rights of third persons, the holder of bonds.<sup>80</sup> But an act authorizing the taking of land for a park in Boston, and laying out and improving the same, etc., but providing that there should be no expenditure of money until an appropriation therefor was made by a two-thirds vote of each branch of councils, and permitting an issue of bonds to the extent of \$500,000 each year, etc.,—whilst the public and even individual citizens and property holders might, in a certain sense, be said to be interested in the execution of the power, did not provide for anything that any person had a subsisting right to demand should be done, but was held to confer a discretion.<sup>81</sup> So, in the case of an act authorizing the supervisors of a county to contract and appropriate money for a map, even though it made it their duty to contract, that word in itself and taken together with an absence of specification, by the act, of the size, etc., being held to imply a discretion.<sup>82</sup> And again, where a statute provides that a trial "may" be removed to another county, on the application of the defendant duly supported by affidavit, or where<sup>83</sup> a statute merely permits the granting of licenses,<sup>84</sup> the permissive words cannot be construed as intended to be mandatory; for the statutes are in the line, not of sustaining an existing,

<sup>78</sup> *Seiple v. Elizabeth*, 27 N. J. L. 407. See § 316.

<sup>79</sup> *Kennedy v. Sacramento*, 10 Sawyer, 29.

<sup>80</sup> See, also, *Supervisors v. U. S.*, 4 Wall. 435; *Galena v. Amy*, 5 Id. 705; *Ralston v. Crittenden*, 3 McCrary, 332.

<sup>81</sup> *Boston, etc., Co. v. Boston*, 143 Mass. 546.

<sup>82</sup> *Bowers v. Sonoma Co.*, 32 Cal. 66.

<sup>83</sup> *Exp. Banks*, 28 Ala. 28; see, also, *Healy v. Dettra*, (Pa.) 7 Centr. Rep. 168.

<sup>84</sup> *State v. Holt Co. Ct.*, 39 Mo. 521.

but of creating a new, right, and for the latter purpose, new rights not being created by implication, an intention to use permissive language in a mandatory sense will not be presumed.<sup>85</sup> It is but a corollary of this principle, that one who has no interest in a provision, permissive in form, cannot insist upon its performance; as, *e. g.*, under a statute relating to foreclosure sales, and providing that such sales “may” be of parcels “so that the whole amount may be realized,” it was held that the mortgagor, having no interest in the fund which was to be raised by the sale, and for the benefit of which the provision was intended, had no right to have it enforced.<sup>86</sup>]

§ 315. **Effect of Express Reference to Discretion.**—In cases in which, upon the principles stated, permissive words are to be read as mandatory, the exercise of the power is not made less imperative by express reference to the discretion of the authorized person. The duty of issuing a summons (*a*), or of examining the churchwarden’s accounts (*b*), was as obligatory under the statute which empowered the justices to issue it or to examine them, “if they should so think fit,” as it would have been if this expression had been omitted. Where the judgment creditor of a company “might” have execution against any individual shareholder of it, if he failed after due diligence to obtain satisfaction of his debt from the company, it was held by the Common Pleas that there was no discretion to withhold this remedy from him in any case in which the Court was satisfied that the specific facts indicated by the statute existed—viz., that the debt was unpaid, that due endeavors had been made, and had failed, to put in force the execution against the company (*c*), and, it may be added,

<sup>85</sup> *Exp. Banks*, *supra*; *State v. Holt Co. Ct.*, *supra*; and see *Exp. Simonton*, 9 Port. (Ala.) 390; *Mitchell v. Duncan*, 7 Fla. 13. See *Cutler v. Howard*, 9 Wis. 309, where, under a statute that provided that the court “may” remove an executor for certain specified causes, the court refused to exercise the discretion merely upon the application of a legatee who, it was held, could not be benefited by, and had no interest in, the removal of the executor,

and upon the sole reason that the executor resided in another state; a circumstance which the act was held not to make a ground for removal. See the strictures upon this case in Sedgw., p. 376, note.

<sup>86</sup> *Bansemmer v. Mace*, 18 Ind. 27.

(*a*) *R. v. Adamson*, *sup.* § 306.

(*b*) *R. v. Cambridge*, *sup.* § 306.

(*c*) 7 & 8 Vict. c. 110; *Morisse v. British Bank*, 1 C. B. N. S. 67; *Hill v. London & Co. Assur. Co.*,

that the creditor had done nothing to disentitle him to execution against the shareholder (*a*); although the statute not only directed that the leave of the Court was to be asked for the execution, but provided that it "should be lawful" for the Court to grant or refuse the application for it, and "to make such order as it might see fit." Another familiar instance may be found in the case of a distress warrant to enforce a poor rate. It is well known that in every case where certain specific facts are proved, viz., that a rate, valid on its face, was made by a competent authority, that the rated land is in the district and in the occupation of the defaulter, and that the latter has been summoned and has not paid, the justices have no option to refuse the warrant, though the statute says only that they "may" issue it "if they think fit" (*b*). In all such cases they must exercise the power; they must "think fit" to do so whenever the occasion for it has arisen. In America, where it was enacted that city councils "might, if deemed advisable" (*c*), or even "might, if they believed that the public good and the best interests of the city required it" (*d*), levy a special tax to be expended in the liquidation of their debts, the Supreme Court issued a mandamus to levy the tax where it was proved that a debt existed, and that there were no other means in possession or prospect for their payment; holding that the discretion of the Town Councils was limited by their duty, and could not, consistently with the rules of law (*e*), "be resolved in the negative" (*f*).

§ 316 [It may be added, that, where the grounds for believing that the Legislature intended to give to its language a compulsory, rather than a directory, efficacy, are

1 H. & N. 398; comp. *Shrimpton v. Sidmouth, etc.*, R. Co., L. R. 3 C. P. 80, decided on the 8 Vict. c. 16.

(*a*) *Scott v. Uxbridge, etc.*, R. Co., L. R. 1 C. P. 596.

(*b*) *R. v. Finnis*, 28 L. J. M. C. 201; *R. v. Boteler*, 33 L. J. M. C. 101. See, also, *R. v. Cambridge*, and *R. v. Adamson*, sup. § 306.

(*c*) *Supervisors v. U. S.*, 4 Wallace, 465.

(*d*) *Galena v. Amy*, 5 Wallace, 705.

(*e*) Adverting to *R. v. Barlow*, sup. § 306.

(*f*) In *R. v. Lancashire JJ.*, sup. § 306, a similar view seems to have been taken of the 45 & 56 Vict. c. 34, s. 1, which enacts that licensing magistrates "shall be at liberty, in their free and unqualified discretion," to grant or refuse beer licenses.

wanting, the word "shall" may be construed as being simply permissive.<sup>87</sup> Thus, where an act provided that the assessment roll "shall" be returned within a certain number of days, it was held, that, no public or private right being impaired by such construction, the provision might be regarded as directory only.<sup>88</sup> And it is said, that, as against the Government, the word "shall," unless a contrary intent appears from the statute, is, merely permissive.<sup>89</sup>

§ 317. **Correction of Omissions and Erroneous Insertions.**—An omission which the context shows with reasonable certainty to have been unintended may be supplied, at least in enactments which are construed beneficially, as distinguished from strictly. Thus, when the 33rd section of the fines and Recoveries Act (3 & 4 Will. 4, c. 74), in providing that if the protector of a settlement should be (1) a lunatic, or (2) convicted of felony, or (3) an infant, the Court of Chancery should be the protector in lieu of the lunatic or the infant, omitted the case of the convict of felony, it was held by Lord Lyndhurst that the omission might be supplied, in order to give effect to the manifest intention. Without it, the mention of the case of felony, in the first part of the sentence, was insensible, and it necessarily implied the missing words (*a*). So, where a statute enacted that suits "against" an association should be brought in the district where it was established, without making any provision for suits "by" the association; but an earlier Act had in a similar clause provided for suits both by and against; the Supreme Court of the United States held that the omission in the later Act was accidental, and might be supplied (*b*).

<sup>87</sup> Fowler v. Pirkins, 77 Ill. 271.

<sup>88</sup> Wheeler v. Chicago, 24 Ill. 105. See § 313. Compare, with the foregoing discussion, that of mandatory and directory provisions, post, §§ 431-440.

<sup>89</sup> R. R. Co. v. Hecht, 95 U. S. 168, 170.

(*a*) *Re* Wainwright, 1 Phil. 258. See, also, in deeds, *Spyve v. Topham*, 3 East, 115; *Dent v. Clayton*, 33 L. J. Ch. 503; *Wilson v. Wilson*, 5 H. L. C. 40, 23 L. J. Ch. 697; and in wills, *Greenwood v.*

*Greenwood*, L. R. 2 Ch. D. 875; *Re Redfern*, 6 Ch. D. 133, 47 L. J. Ch. 17.

(*b*) *Kennedy v. Gibson*, 8 Wallace, 491. *Comp. Hancock v. Lablache*, 3 C. P. D. 197. [But the necessity of great caution in the supplying of omissions must again be adverted to. In a recent decision, referred to above, § 295, note, the Court of Appeals of New York said: "If [the Legislature] have failed to insert such provisions in the law as will accomplish

[So again, where the first section of an act authorized an aqueduct company to take and use the water of two ponds and of a certain lake, and the fifth section provided that nothing in the act should be so construed as to authorize the company "to raise the water of any of said ponds above high water mark," etc., it was held that the restriction applied as well to the lake as to the ponds.<sup>90</sup> And conversely, if, from all sources of interpretation, it appears that a provision was inadvertently inserted in a statute, it may be disregarded." Thus, the words "or both such fine and imprisonment at the discretion of the Court," which had been cut out of the original act by a subsequent one, but were erroneously re-instated in the reproduction of the act in a section of a revision of statutes, relating to assault and battery, were treated as inoperative.<sup>91</sup> And it is said that the fact that a code is declared to be embodied in the law, does not give the effect of law to inaccuracies that may have crept into the book.<sup>92</sup> So, where two acts, the one passed in 1867, declaring bills of exchange and promissory notes payable at a bank or private banking house to be governed by the commercial law; the other, passed in 1873, declaring bills of exchange and promissory note payable at a bank or banking house, or at a certain place of payment therein designated to be so governed, were inserted in a code, under § 2100 and § 2074 respectively, it was held that the insertion of the earlier act must be considered as an oversight on the part of the codifiers, and that the section embodying the act of 1873 must be held to repeal the other so far as there was any conflict between them.<sup>93</sup>]

§ 318. **Elliptical Sentences. Transposition of Words, etc.—**

The sixth section of Lord Tenterden's Act furnishes another example of clerical neglect, which was treated in the same

the result intended, their omission cannot be remedied by construction, and the law must to that extent be considered defective and inoperative." *Furey v. Gravesend*, 104 N. Y. 405; 6 Centr. Rep. 501, 503.]

<sup>90</sup> *Brickett v. Haverhill Aqueduct*, 142 Mass. 394. No reason is given by the court for this construction,

beyond, "we have no doubt," etc.

<sup>91</sup> *Pond v. Maddox*, 38 Cal. 572. See, also, *Jones v. Hutchinson*, 43 Ala. 721; *Com'th v. Jackson*, 5 Bush (Ky.) 680.

<sup>92</sup> *State v. Lee*, 37 Iowa, 402.

<sup>93</sup> *Atlanta v. Gas Light Co.*, 71 Ga. 106.

<sup>94</sup> *Mobile Sav. B'k v. Patty*, 16 Fed. Rep. 751.

spirit. It enacts that no action shall be brought in respect of a representation made by one person concerning the conduct or credit of another, to the intent that the latter "may obtain credit, goods, or money upon," . . . unless the representation was in writing. The text is clearly imperfect. Lord Abinger, while deeming any conjectural transposition of the words inadmissible, held that the word "upon" must be rejected as nonsensical; but Baron Parke considered that the Court was at liberty either, by transportation, to read the passage "may obtain goods or money on credit," or to interpolate after "upon" the words "such representations" (a). [A transposition of words is, indeed, to be made wherever the intention of the Legislature and the context require such a change." Thus "current expenses of the year" was read "expenses of the current year;"<sup>95</sup> and in another case a clause in a section of revised statutes was construed as if a proviso found in the middle of the clause were placed at the end," and again, in construing a statute so as to make it conform to the legislative intent, it was held that a clause which was included in the second section should be read as if included in the first, and as qualifying the provisions of the latter.<sup>96</sup>]

(a) Lyde v. Barnard, 1 M. & W. 101, 115. In statutes governed by the principle of strict construction, such emendations have been refused: See Underhill v. Longridge, etc., inf., § 336.

<sup>95</sup> Matthews v. Com'th, 18 Gratt. (Va.) 989.

<sup>96</sup> Babcock v. Goodrich, 47 Cal. 488.

<sup>97</sup> Waters v. Campbell, 4 Sawyer, 121.

<sup>98</sup> State v. Turnp. Co., 16 Ohio St. 308. Comp. however, Poor v. Considine, 6 Wall. 458, ante, § 13. The power of the court to transfer clauses in a statute, the grounds upon which, and the methods by which, it will be exercised are well illustrated by two cases, one arising in Virginia, and already referred to, the other decided in Nebraska. In the former case, Matthews v. Com'th, 18 Gratt. (Va.) 989, it was said that a construction is to be put upon a statute, which conforms to

its obvious intention, though the collocation of the different branches of a provision are, by mistake, so arranged as to lead at first blush to a different conclusion. The intention having been found (1) by the reason of the thing, (2) by the grammatical construction of the section as it stood, showing that a certain clause should follow, instead of preceding, another, and (3) by the context, reference was made to the legislative journals to verify the construction arrived at by a transposition of the clauses in accordance with the intention thus ascertained, when it was found that an amendment by inserting certain words *after* a designated word in the original act had been made without regard to the fact that certain other words had been already inserted by a previous amendment. In the other case, State v. Forney, 21 Neb. 223, 226 et seq., the court, in construing an

§ 319. **Clerical Errors.**—Clerical errors may be read as amended (a). Thus, in the provision of the Metropolitan Local Management Act, that no road shall be formed as a street for carriage traffic unless widened to forty feet, *or* unless such street shall be open at both ends, the word “or” was read “nor,” for the manifest intention was not that one of the two, but that both conditions should be complied with; that is, that the street should not only be forty feet wide, but also be open at both ends (b). [In an act incorporating a railway company, and prescribing a method by which the same could acquire the title to lands, where no agreement could be arrived at amicably, by proceedings in the court of common pleas “upon final judgment *or* appeal therefrom,” it was held, that, both on the ground of absurdity there being no such thing as an appeal allowed from a final judgment, and by analogy with former railroad acts, “or” should be read “on.”<sup>99</sup> So too, “acts” was read “act.”<sup>100</sup> “Venire” was read “venue,” in a statute declaring that the

act said that a bare inspection of the 4th section, or that part of it which preceded the proviso, would satisfy anyone that the Legislature never intended to pass it in that form; that an examination of § 5, as printed, would show that § 4, as originally drafted, contained certain words of § 5 as printed; that the records disclosed the fact that such was the form of the bill as introduced, and as it stood until it came from the hands of the printer, in the form in which it was finally passed and stood upon the statute book; that the portion of § 4 coming just before the proviso meant nothing at all, as it stood; whilst, read in connection with the portion of § 5 referred to, it showed a certain purpose; and that it must accordingly be so read.

(a) As where, for instance, an Act refers to another by the title and date, and mistakes the latter: 2 Inst. 290; Anon. Skinn. 110; R. v. Wilcock, 7 Q. B. 317; *Re Boothroyd*, 15 M. & W. 1. [See ante, § 302.]

(b) *Metrop. Board v. Steed*, 8 Q. B. D. 445, 51 L. J. 22.

<sup>99</sup> *Levering v. R. R. Co.*, 8 Watts & S. (Pa.) 459, 463. Conversely “on” was read “or,” as a clear mistake, in *Gould v. Wise*, 18 Nev. 253. A clerical error in the title of an act, made in engrossing, after passage, but before approval, was held not to invalidate the statute, if, upon the whole, the effect was not to mislead: *People v. Onondaga*, 16 Mich. 254, Cooley, J., diss. The printed act may be corrected by the enrolled bill on file in the state department: *Reed v. Clark*, 3 McLean, 480. But it is said that an act as approved by the Executive must be deemed the law, notwithstanding the apparent omission of some provisions indicated by the legislative journals: *State v. Liedke*, 9 Neb. 462.

<sup>100</sup> *Jocelyn v. Barrett*, 18 Ind. 128. In *Hill v. Williams*, 14 Serg. & R. (Pa.) 287, 289, it is said that “persons” is often applicable to one party; for instance, a minor may have several guardians, or several masters, who are in partnership; in such cases, for certain purposes, all the guardians or both the masters, constitute one party.

"venire" in actions against railroad companies should be laid in the county in which the track was located.<sup>101</sup> "Dennis Mills" was held a misprint for "Dunn's Mill."<sup>102</sup> "South," in a statute defining the boundaries of a county, being clearly a mistake for "north," was so read;<sup>103</sup> and "Louis Mankel," for "Lewis Menkel;"<sup>104</sup> "final judgments" for "penal judgments;"<sup>105</sup> "ad respondendum" for "ad satisfaciendum;"<sup>106</sup> and "proviso to article 411" for "provisions to article 411."<sup>107</sup> The date "first day of July" specified by an act as the day from which all suits then pending should be subject to appeal, according to a prescribed mode, was read as meaning the first Monday in July;<sup>108</sup> and in an act providing that a Circuit Court in a certain district should be held the fifth Monday after the fifth Monday in January and July, it was held that the second "fifth" should be read "fourth."<sup>109</sup> Where, in a statute describing the boundaries of a county, an error occurred which would have made the county to consist of two detached pieces, it was corrected by the court;<sup>110</sup> and, in a similar statute, where a misdescription resulted from the use of the sign of a degree, instead of a decimal point between figures, whereby the calls would have become meaningless, the sign was treated as a decimal point.<sup>111</sup> An act being, by clear mistake entitled a supplement to the act of 27 February, 1867, but intended to be a supplement to that of 13 April, 1867, was to be read, with the effect of not

<sup>101</sup> *Graham v. R. R. Co.*, 64 N. C. 631.

<sup>102</sup> *Lindsley v. Williams*, 20 N. J. Eq. 93.

<sup>103</sup> *Palms v. Shawano Co.*, 61 Wis. 211.

<sup>104</sup> *Mankel v. U. S.*, 19 Ct. of Cl. 295.

<sup>105</sup> *Moody v. Stephenson*, 1 Minn. 401.

<sup>106</sup> *People v. Hoffman*, 97 Ill. 234; so held on petition for habeas corpus, the arrest having been made under the statute on a *capias ad respondendum*.

<sup>107</sup> *Chambers v. State*, 25 Tex. 307; *Hearn v. State*, Id. 336: there being but one provision in the article except that contained in the proviso, and the act in which the mistake occurred being an act

amending the penal code.

<sup>108</sup> *Burch v. Newbury*, 10 N. Y. 374.

<sup>109</sup> *Haney v. State*, 34 Ark. 263, the court declaring, that, where it is apparent that the Legislature did not intend to use a particular word occurring in a statute, and it is further apparent what word it did intend, the court will correct the mistake by substituting the latter, and finding from other and similar provisions in the statute that the "fourth," and not the "fifth" Monday was intended.

<sup>110</sup> *Reynolds v. Holland*, 35 Ark. 56; though it was said that a county might be created of such a kind: *Ib.*

<sup>111</sup> *Brown v. Hamlett*, 8 Lea (Tenn.) 732.



reviving the local act of 27 February, 1867, which had been repealed by the general act of 13 April, 1867.<sup>112</sup> So, where there was a mistake in the description of a street in an ordinance for laying it out, the street being sufficiently identified, the error was read corrected.<sup>113</sup>

[In fact, a mistake apparent on the face of an act, which may be corrected by other language of the act, is never fatal.<sup>114</sup> In all such cases, it may, with propriety, be said that the context rectifies the error,<sup>115</sup> and it is not the Court that assumes to correct the Legislature.] It has, indeed, been asserted that no modification of the language of a statute is ever allowable in construction, except to avoid an absurdity which appears to be so, not to the mind of the expositor merely, but to that of the Legislature; that is, when it takes the form of a repugnancy (*a*); [that words are never to be supplied or changed, except to effect a meaning clearly shown by other parts of the statutes—to carry out an intention somewhere expressed.<sup>116</sup>] In such cases, the Legislature shows in one passage that it did not mean what its words signify in another; and a modification is therefore called for and sanctioned beforehand, as it were, by the author. But the authorities do not appear to support this restricted view. They would seem rather to establish that the judicial interpreter may deal with careless and inaccurate words and phrases in the same spirit as a critic deals with an obscure or corrupt text, when satisfied, on solid grounds (*b*), from the context or history of the enactment, or from the injustice, inconvenience, or absurdity of the consequences to which it would lead, that the language thus treated does not really express the intention, and that his amendment probably does.

§ 320. **Equitable, in the Sense of Liberal, Construction.**—The

<sup>112</sup> Keller v. Com'th, 71 Pa. St. 413.

<sup>113</sup> State v. Orange, 33 N. J. L. 49.

<sup>114</sup> Blanchard v. Sprague, 3 Sumn. 279.

<sup>115</sup> See Com'th v. Marshall, 69 Pa. St. 328, 332.

(*a*) Per Willes, J., in Motteram v. E. C. R. Co., 7 C. B. N. S. 558,

29 L. J. 64; Abel v. Lee, L. R. 6 C. P. 371; Christopherson v. Lotinga, 15 C. B. N. S. 809; 33 L. J. 371; per Brett, J., in Boon v. Howard, L. R. 9 C. P. 305.

<sup>116</sup> Lane v. Schomp, 20 N. J. Eq. 82.

(*b*) Comp. Green v. Wood, *sup.* 23, 24, and cases cited, § 24.

practice of modifying the language, and controlling the operation of enactments, however, was formerly carried to still greater lengths. It used to be laid down that a remedial statute should receive an equitable construction; so that cases out of its letter should, if within the general object or mischief of the Act, be brought within the remedy which it provided (*a*).

It is to be observed, indeed, that this expression is often used in the older authorities in a different sense. Lord Mansfield said that equity was synonymous with the intention of the Legislature (*b*); and in this sense an equitable construction is plainly free from objection; [what is within the plain intention of the makers of a statute, not falling under the rule of strict construction,<sup>117</sup> being as much within the statute, as if it were within its letter,<sup>118</sup> and that which is plainly not within the intention of a statute, remaining unaffected by it, although the letter of the law, disregarding the limits of its scope and object, would *prima facie* include it.<sup>119</sup>] The "equitable" construction, which included uses within the Statute de donis, though that enactment spoke only of "lands and tenements," and may have originally contemplated only common law estates (*c*), and which applied the 2 Hen. 5, c. 3 (requiring that a juror should have "lands" worth forty shillings), to the *cestui que use*, and not to the *feoffee*, when the legal estate was in the latter (*d*), would seem to fall within the now recognized ordinary rules of construction. The 4 Ed. 3, c. 7, which gave executors an action against trespassers for a wrong done to their testator, was said to have given them also an action on the case, by "the equity" of the statute (*e*); but the decision was strictly on the letter of the Act. It turned on the construction of the word "trespass," which was held to mean a

(*a*) Co. Litt. 24b; Bac. Ab. Statute I. 6; Com. Dig. Parliament, R. 13. [Hersha v. Brenneman, 6 Serg. & R. (Pa.) 2; Lehigh Bridge Co. v. Coal, etc., Co., 4 Rawle (Pa.) 9.]

(*b*) R. v. Williams, 1 W. Bl. 95.

<sup>117</sup> See Melody v. Reab, 4 Mass. 471.

<sup>118</sup> Riddick v. Walsh, 15 Mo.

519; *i. e.*, if it comes within the *same*, not merely within a *like* reason: U. S. v. Freeman, 3 How. 556, 565, and see Jacob v. U. S., 1 Brock, Marsh. 520.

<sup>119</sup> See ante, §§ 73 et seq., 113 et seq.

(*c*) Corbet's Case, 1 Rép. 88.

(*d*) Co. Litt. 272b.

(*e*) Russell v. Prat, Leon. 194.

wrong done generally, and of "trespassers," which was held to mean wrongdoers (*a*). The decision that the Statute of Gloucester, c. 5 (which gives the action of waste against lessees for life, or "for years," to recover the wasted place and treble damages) reached "by equity" a tenant for one year and even for half a year, was apparently of a similar character (*b*). So, when it is said that it is on "the equity," or "equitable construction" of the Statute 2 W. & M. c. 5 (which empowers a landlord to sell for the best price the goods which he has distrained for arrears of rent, if the tenant does not replevy in five days), that an action lies against the landlord who sells before the expiration of five days, though after impounding (*c*), or after a tender of the rent and expenses within that time (*d*), or for less than the best price (*e*); no more seems to have been intended than that a cause of action was given by implication (*f*) against the landlord who thus abused the power of sale thereby conferred on him.

§ 321. [So, where an act which provided, that, if any child of an intestate shall have any estate by settlement from, or shall have been advanced by, him, in his life-time, the value thereof shall be deducted from the child's share in the estate under the intestate law, and, if in excess of such share, shall exclude the child from distribution, was held to include the case of an advanced grandchild, partly upon the ground of equitable construction, the decision was, in fact, only the application to a statute of the rule, long familiar in the interpretation of wills, that children may include grandchildren, where the intention is clear and such a meaning is required to effectuate that intention; the manifest intention

(*a*) *Per* Lord Ellenborough in *Knubley v. Wilson*, 7 East, 135. It was held to extend to all torts except those relating to the testator's freehold, or where the injury was of a purely personal nature. See *Williams v. Cary*, 4 Mod. 403, 12 Mod. 71; *Berwick v. Andrews*, 2 Lord Raym. 973; *Bradshaw v. Lanc. & York. R. Co.*, L. R. 10 C. P. 189; *Leggatt v. Gt. Northern R. Co.*, 1 Q. B. D. 599. See *per* Bramwell, L. J.,

in *Twycross v. Grant*, 4 C. P. D. 45.

(*b*) Co. Litt. 53a; 2 Inst. 302.

(*c*) *Wallace v. King*, 1 H. Bl. 13. See, also, *Pitt v. Shew*, 4 B. & A. 208; *Harper v. Taswell*, 6 C. & P. 166.

(*d*) *Johnson v. Upham*, 2 E. & E. 250, 28 L. J. 252. See *R. v. Cox*, 2 Burr. 785; *R. v. Younger*, 5 T. R. 449.

(*e*) Com. Dig. Distress, D. 8.

(*f*) See Chapter XV.

of the statute in question being to equalize the distribution.<sup>120</sup> And in the construction of this statute, as in that entitling the eldest son of an intestate to priority of choice in accepting real estate of the decedent, under which it was held, that, where the eldest son died in the lifetime of the decedent, his children, the decedent's grandchildren by his eldest son, were within the equity of the statute, and took his place and priority of choice, the construction thus imposed upon the language in question was an adoption of the construction previously put upon an English act of similar tenor, transcribed upon the statute-book of the state in which the cases arose.<sup>121</sup> Again, in the construction of the Pennsylvania married woman's act of 1848, in the provision, that, upon the wife's contract for necessities, an action may be maintained against her and her husband, and upon a judgment obtained therein, execution may issue against the husband alone, and if no property of his be found, and the writ so returned, an alias execution shall issue to be levied upon and satisfied out of the separate property of the wife secured to her by the act, it was held, that, where the wife died before suit, leaving a separate estate, and her husband surviving her, in strict law his survivorship cast the burden upon him, and as no action could be brought against the husband and wife, there could be no execution against her estate; and that, whilst, therefore, the right of the creditor to come in upon her estate, in such case, was not within the letter of the law, yet that right existed as within its equity, upon the husband's inability to pay the debt upon her decease.<sup>122</sup> Here, too, the phrase "equity of the law" would seem to mean nothing but its intention, as derived from a common sense reading of its language. The decision itself, as numerous others upon the same statute, admits that its design was to protect the tradesman who furnished necessities upon the credit of the wife, by giving him, not only a remedy against the husband, but, in case of his inability to pay, against her estate also, to make both

<sup>120</sup> Eshelman's App., 74 Pa. St. 42, 47.

<sup>121</sup> Hersha v. Brennenman, 6

Serg. & R. (Pa.) 2; Eshelman's App., supra. See post, § 371.

<sup>122</sup> Davidson v. McCandlish, 69 Pa. St. 169, 172-3.

liable, not jointly, but alternately, the husband primarily, the wife secondarily, but both absolutely. If the death of the wife were to destroy the liability of her estate, the object of the act, clearly ascertained, would be largely defeated—an intention not imputable, of course, to the Legislature.

[The construction of the Massachusetts act of 1855, giving certain privileges to "any woman who may hereafter be married in this commonwealth," so as to include a woman, who, with her husband, had her domicile in that state, at the time of marriage, although the ceremony was performed in the state of New York;<sup>123</sup> and of the Kentucky statute, giving certain powers of suit to married women "who shall come in the state" without their husbands, so as to be applicable to a married woman who had already so come when the act was passed,<sup>124</sup> are instances of constructions

<sup>123</sup> *Woodbury v. Freeland*, 82 Mass. 105. See, also, *Johnson v. Gibbs*, 140 Mass. 186, where a statute limiting actions on indentures of apprenticeship given in the case of town paupers to two years, was extended to cases of state-paupers, as within its intention, on the ground that the policy of the law had always been to exempt indentures by public officers binding paupers, state or town, as apprentices, from the provision of the general statute of limitations allowing an action on a sealed covenant within twenty-one years after breach, and in this respect to put town and state paupers on the same footing, and that there was no reason to suppose an intention to change this policy. And in *State ex rel. Broome v. Teleph. Co.*, 8 Centr. Rep. 589, the Supreme Court of New Jersey held that the phrase "incorporated city or town," in the acts 9 Apr. 1875, and 11 March, 1880, requiring telegraph companies to apply to the legislative authorities of such for a designation of the streets in which poles shall be erected, included a township, and any other municipality, "through which streets, rather than roads, [*i. e.*, "country roads:" p. 590,] were laid." "We think it was the pur-

pose of these laws to make such an application necessary wherever there was this reason for so doing, and that the word 'towns' should receive an interpretation broad enough to include all such places, whether they are formally styled towns, townships, boroughs or villages." "If the highways were not streets, but only country roads, or if the legislative body of the municipality had not been invested with legal control over such erections, then the same reason for requiring the application did not exist:" *Ibid.*, p. 590. See *Wayne Co. v. Detroit*, 17 Mich. 390, as to the scope of the phrase "counties and townships" in a constitutional provision: post, § 518.

<sup>124</sup> *Maysville, etc., R. R. Co. v. Herrick*, 13 Bush (Ky.) 122. "To exclude her," says the court in its decision, "because the statute speaks only of married women 'who shall come,' . . . would be to adhere to the letter of the law, and to disregard its spirit," and declaring the act to be an enabling act intended for the benefit of a class of persons under legal disability and not enjoying the protection incident to the state of marriage because of the husband's absence from the state, it proceeds: "and a person clearly within this class

quite within the meaning of the phrase "equitable construction" as applied to the cases above referred to, and yet in no degree transcending the measure of that liberality and fairness with which words in statutes are to be interpreted in the accomplishment of the manifest intent of the Legislature. In this sense, it is evident, "equitable" construction does not go any farther than, or signify anything materially different from, "liberal" construction.<sup>129</sup>]

§ 322. **Equitable Construction in its Strict Sense.**—But the expression has been more generally used in other senses [having, to judge from some of the cases in which it has been thus applied, little enough to do with the intention of the Legislature]. In the construction of old statutes, it has been understood as extending to general cases the application of an enactment which, literally, was limited to a special case; [as requiring, that, when the expression in a statute is special or particular, but the reason is general, the expression should be deemed general.<sup>130</sup>] Thus, the Statute of Westminster 1 (3 Ed. 1, c. 4), which enacted that a vessel should not be adjudged a wreck, if a man, a dog, or a cat escaped from it, was regarded as exempting a vessel from such adjudication, by an equitable construction, if any other animal escaped, those named being put only for example (a). The 46th chapter of the same statute, which directed the judges of the King's Bench to hear their causes in due order, was extended, on the same principle, to the judges of the other Courts (b); and the Statute of Westminster 2, 31, which gave the bill of exceptions to the ruling of the judges of the Common Pleas, was similarly held applicable, not only to the other judges of the Superior Courts, but to those of the County Courts, the Hundred, and the Courts Baron; their judges being still more likely to err (c). The 5 Hen. 4, c. 10, which forbade justices of the peace to commit to any

will not be denied the benefit of a remedial statute by grammatical construction, at the expense of the manifest legislative intent."

<sup>129</sup> Comp. ante, § 110 and note 242.

<sup>130</sup> *People v. Ins. Co.*, 15 Johns. (N. Y.) 880; *Whitney v. Whitney*,

14 Mass. 92; *Eshelman's App.*, 74 Pa. St. 42.

(a) 2 Inst. 167, 5 Rep. 107. See *R. v. Dowling*, 8 E. & B. 605, ante, § 800.

(b) 2 Inst. 256.

(c) 2 Inst. 426; *Strother v. Hutchinson*, 4 Bing. N. C. 88.

other than the common jail, was held to be equally imperative on all other judicial functionaries (*a*). The Statute of 1 Rich. 2, c. 12, which forbade the Warden of the Fleet to suffer his prisoners for judgment debts to go at large, until they had satisfied their debts, was held to include all jailors (*b*). The Statute of Gloucester (6 Ed. 1), c. 11, in speaking of London, was considered as intending to include all cities and boroughs equally; the capital having been named alone for excellency (*c*). The statute, or writ of *circumspecte agatis*, 13 Ed. 1, which directs the judges not to interfere with the Bishop of Norwich or his clergy in spiritual suits, was construed as protecting all other prelates and ecclesiastics, the Bishop of Norwich being put but for an example (*d*).

§ 323. Reason for such Construction in Ancient Statutes.—This kind of construction, which would not be tolerated now (*e*), [or which, though possibly tolerated in remedial and perhaps some other statutes, should always be resorted to with great caution, and never extended to penal statutes or mere arbitrary regulations of public policy,<sup>127</sup> so as never to warrant, *e. g.*, the conviction of an accused person on the ground that his crime comes within the equity of the statute,<sup>128</sup>] was said to have been given to ancient statutes in consequence of the conciseness with which they were drawn (*f*); though the specific expressions used can hardly be considered more concise than the more abstract terms for which they were, possibly, substituted. It has been explained, also, on the ground that language was used with no great precision in early times, and that Acts were framed in harmony with the lax method of interpretation contem-

(*a*) 2 Inst. 43.

(*b*) *Platt v. Lock*, Plowd. 35.

(*c*) 2 Inst. 322.

(*d*) 2 Inst. 487. [Possibly upon a similar principle, it was said that a certain act of Congress giving the Secretary of War power to discharge enlisted minor upon certain conditions, might be construed as providing a method for the discharge of persons, generally, improperly enlisted: *Matter of O'Connor*, 48 Barb. (N. Y.) 258;

and prohibiting any other method: *Ibid.* But see *Jacob v. U. S.*, 1 Brock. Marsh. 520.]

(*e*) *Per* Pollock, C. B., in *Miller v. Salomons*, 7 Ex. 475, 21 L. J. 197.

<sup>127</sup> *Melody v. Reab*, 4 Mass. 471.  
<sup>128</sup> *U. S. v. Ragsdale*, Hempst.

497.

(*f*) 2 Inst. 401; 10 Rep. 30b; *per* Lord Brougham in *Gwynne v. Burnell*, 6 Bing. N. C. 561.

poraneously prevalent (*a*). It has also been accounted for by the fact that in those times the dividing line between the legislative and judicial functions was feebly drawn, and the importance of the separation imperfectly understood (*b*). The ancient practice of having the statutes drawn by the judges from the petitions of the Commons and the answers of the King (*c*) may also contribute to account for the wide latitude of their interpretation. The judges would naturally be disposed to construe the language in which they framed them as their own, and therefore with freedom and indulgence.

§ 324. **Equitable Restriction of Modern Statutes.**—But an equitable construction has been applied also to more modern statutes, and in a sense departing still more widely from the language, [restraining a statute “by equity” where a case was within its words, but supposed not to be within its mischief.<sup>129</sup>] Thus, although the 3rd section of the 21 Jac. c. 16, enacted that certain actions should be brought within six years after the cause of action accrued, “and not after,” it was nevertheless held, notwithstanding these negative terms, that where an action was brought within six years, but abated by the death of either party, a reasonable time—that is, a year, computed, not from the death, but from the grant of administration—was to be granted by an equitable construction of the statute beyond the period given, to bring a fresh action by or against the personal representatives of the deceased (*d*). The provision of the Statute of Frauds, which prohibits the enforcement of agreements for the purchase of lands, unless they be in writing, was held not to prevent the Court of Chancery from decreeing the specific performance of such agreements, though not in writing, where they had been partly performed. On all questions on that statute, it was said, the end and purport for which it was made—namely, to prevent frauds and perjuries—was to be considered; and any agreement in which there was no

(*a*) *Per* Lord Ellenborough in *Wilson v. Knubley*, 7 East, 134.

(*b*) Sedg. *Interp. Stat.* 311.

(*c*) *Co. Litt.* 272a; *sup.* §58, note.

<sup>129</sup> *Wilb.*, p. 243.

(*d*) *Hodsdon v. Harridge*, 2 Wms. Saund. 64a; *Curlewis v. Mornington*, 7 E. & B. 283, 27 L. J. 439. See, also, *Piggott v. Rush*, 4 A. & E. 912.



danger of either, was considered as out of the statute (*a*). The statute was not made to cover fraud (*b*); and as it would be a fraud on one of the parties if a partly-performed contract were not completely performed, the Court of Chancery compelled its performance in contradiction to the positive enactment of the statute (*c*). This doctrine, however, which was said by Eyre, C. B., to have raised the very mischief which the statute intended to prevent (*d*), and which would probably have found no more favor at a later period in equity (*e*), was never recognized by the courts of common law (*f*). On similar grounds, it would seem, although the various Acts of Parliament which created stocks since the beginning of the reign of George I. provided that no method of assigning or transferring the stock, except that provided by the Act, should be valid or available in law,<sup>180</sup> and directed that the owner of stock might devise it by will, attested by two witnesses, it was established by repeated decisions, that, notwithstanding such express terms, stock might be disposed of by an unattested will; it being held that, if not valid as a devise, the will nevertheless bound the executor as a direction for the disposition of the stock (*g*).

(*a*) *Per* Lord Hardwicke in *Atty. Genl. v. Day*, 1 Ves. 221.

(*b*) *Per* Turner, L. J., in *Lincoln v. Wright*, 4 DeG. & J. 16, 28 L. J. Ch. 705; *Haigh v. Kaye*, L. R. 7 Ch. 474; *Williams v. Evans*, L. R. 19 Eq. 547, 44 L. J. Ch. 319; *Ungley v. Ungley*, 5 Ch. D. 887, 46 L. J. 854.

(*c*) *Per* Lord Redesdale in *Bond v. Hopkins*, 1 Sch. & Lef. 433. See, also, *Atty-Genl. v. Day*, 1 Ves. 221; *Lester v. Foxcroft*, 1 Colles, 108, and *Tudor's Eq. Ca.*, where the later authorities are collected; 2 *Story Eq. Jur.* §§ 752 et seq.; *Webster v. Webster*, 27 L. J. Ch. 115; *Wilson v. West Hartlepool Co.*, 2 DeG. J. & G. 475, 34 L. J. Ch. 241; *Nunn v. Fabian*, L. R. 1 Ch. 35. See *Alderson v. Maddison*, 7 Q. B. D. 178, and *Humphreys v. Green*, 10 Q. B. D. 148.

(*d*) *O'Reilly v. Thompson*, 2 Cox, 273.

(*e*) See *ex. gr. Hughes v. Morris*,

2 DeG. M. & G. 349, 21 L. J. Ch. 761.

(*f*) *Boydell v. Drummond*, 11 East, 142, 159; *Cocking v. Ward*, 1 C. B. 858.

<sup>180</sup> A provision requiring the transfer to be entered on the books of the company, is said to be intended merely for the security of the corporation, and no force is to be given to it further than to effect that purpose: *Ang. & Ames, Corp.*, § 354. Hence, a transfer not entered on the books is good against the world, except a subsequent purchaser in good faith without notice, in spite of such provision: *People v. Elmore*, 36 Cal. 653; even though embodied in the act of incorporation: *Duke v. Nav. Co.*, 10 Ala. 82; and see *B'k of Commerce's App.*, 73 Pa. St. 59; *Agricult. B'k v. Burr*, 24 Me. 256.

(*g*) *Ripley v. Waterworth*, 7 Ves. 440; *Franklin v. Bank of England*, 1 Russ. 589.

[The manner in which courts, upon supposed grounds of equity have assumed to disregard statutes is well illustrated by the decisions of courts of equity under the usury laws, on applications made for the purpose of restraining the enforcement of, or to relieve against, contracts which the law declared void, either in whole or in part, on the ground of usury. The rule has been not to entertain such applications except upon payment by the borrower of the principal and lawful interest.<sup>131</sup>]

§ 325. **Principle of Equitable Construction Discredited.**—This principle of equitable construction has, however, fallen into discredit. [and become “looked on with distrust; and courts of chancery endeavor to adhere to the much more logical rule that equity follows the law.”<sup>132</sup>] It was condemned, indeed, by Lord Bacon, who declared that *non est interpretatio, sed divinatio, quæ recedit a litera* (a); Lord Tenterden lamented it (b), and pronounced it dangerous (c); and it may now be

<sup>131</sup> See, *inter alia*, *Benfield v. Solomon*, 9 Ves. Jr. 184; *Rogers v. Rathbun*, 1 Johns. Ch. (N. Y.) 367; *Mitchell v. Oakley*, 7 Paige (N. Y.) 68; *Fulton B'k v. Beach*, 1 Id. 429; *Utica Ins. Co. v. Scott*, 6 Cowen (N. Y.) 294; *Jackson v. Varick*, 2 Wend. (N. Y.) 294; *Miller v. Ford*, 1 N. J. Eq. 358; *Jordan v. Trumbo*, 6 Gill & J. (Md.) 103; *Legoux v. Wante*, 3 Har. & J. (Md.) 184; *McRaven v. Forbes*, 7 Miss. 569; *Eslava v. Elmore*, 50 Ala. 587; *Tooke v. Newman*, 75 Ill. 215; *Pickett v. Bank*, 32 Ark. 346. But see *Norcum v. Lum*, 33 Miss. 299, where it was conceded, that, upon a bill in equity to restrain the sale of land conveyed to secure an usurious debt, the debtor was to be relieved, upon proof of usury, of all interest to the same extent as if he had made his defense at law; and *Catlin v. Gunter*, 11 N. Y. 368, where the power of the court to abridge the rights given by the statute were emphatically denied; and see *Roberts v. Goff*, 4 B. & Ald. 92,—all showing that the later decisions have recognized the errors of former ones, and that the courts are becoming more and more disposed

to give full effect to the legislative will. See, also, *Warfield v. Fox*, 53 Pa. St. 382; *Hunt v. Wall*, 75 Id. 413, where the court, in construing a statute of limitation as to real actions, refused to make an exception in favor of persons under disabilities, excepted in the general statute of limitations. See, also, *McGaughey v. Brown*, 46 Ark. 25, that courts of equity in cases of concurrent jurisdiction consider themselves bound by the statutes of limitations that govern courts of law in like cases, and this rather in obedience to the statutes than merely by analogy: *cit. Farman v. Brooks*, 9 Pick. (Mass.) 212.

<sup>132</sup> *Sedgw.*, p. 311; (where it is said, nevertheless: “It cannot be denied, however, that a large class of exceptions has been introduced and established.”) The rules for the construction of statutes are the same in courts of law and in courts of equity: *Talbot v. Simpson*, Pet., C. Ct. 188.

(a) *Adv. of Learning*.

(b) *R. v. Turvey*, 3 B. & A. 522.

(c) *Brandling v. Barrington*, 6 B. & C. 475.

considered as altogether discarded as regards the construction of most modern statutes (*a*). Statutes are now to be considered as framed with a view to equitable as well as legal doctrines (*b*). For instance, the fact that an execution creditor had notice, when his debt was contracted, that his debtor had given a bill of sale to another person which was not registered, was held not to prevent the execution creditor from availing himself of the non-registration (*c*).

§ 326. **When Established Equitable Construction of One Statute Applied to Another.**—Where, indeed, a modern statute is strictly (*d*) in *pari materia* with one which has already received an equitable construction, that construction is extended to it on the general principle that they form together one body of law, and are to be construed together (*e*). Thus, the 3 & 4 Will. 4, c. 42, s. 3, which limits the time for bringing actions on bonds and other specialties to twenty years, in language identical with that used in the 21 Jac. c. 16, s. 3, respecting simple contract debts, received the same equitable construction as had been given to the last-named Act; and the administrator of the obligor of a bond which had been put in suit in 1831, in which year the action abated by the death of the obligor, was held to be liable to be sued in 1858, within a year from the grant of letters of administration (*f*).

§ 327. **Adoption of Principle from Analogy to Statute.**—It may not be out of place to mention here that the expression “the equity of a statute” is sometimes used as meaning the principle or ground of a rule adopted from analogy to a statute; [and in this sense, the rule as to the equity of a statute is said to be especially applicable to statutes relating to practice and procedure.<sup>184</sup>] For instance, the 6 Rich. 2, which provided that a writ should abate, if the declaration showed that the contract sued upon was made in a different

(*a*) See *per* Jessel, M. R., in *Exp. Walton*, 17 Ch. D. 750.

(*b*) *Per* James, L. J., and Mellish, L. J., 2 Ch. D. 296, 297.

(*c*) *Edwards v. Edwards*, 2 Ch. D. 291, 45 L. J. 56.

(*d*) *Comp. Adam v. Inhabts. of Bristol*, 2 A. & E. 389.

(*e*) Sup. §§ 43 et seq. [See *Hersha v. Brenneman*, 6 Serg. & R. (Pa.) 2; *Eshelman's App.*, 74 Pa. St. 42, ante, § 321.]

(*f*) *Sturgis v. Darrell*, 4 H. & N. 622, 28 L. J. 366.

<sup>184</sup> See *Hoguet v. Wallace*, 28 N. J. L. 523.

county from that mentioned in the writ, is said to have led, by the equity of that statute, or the analogy which it furnished, to the introduction, by the judges, in the reign of James I., of the practice of changing the venue on motion, where there was no variance between the writ and declaration, as to the place where the cause of action arose (*a*). [The provision of a statute that the burden of showing irregularities in sales theretofore or thereafter made under a certain statute, should be on the party objecting to the sale, was applied to sales made under earlier statutes of similar purport, as being within the spirit of the enactment.<sup>186</sup> And a statute allowing judgment to be entered in vacation on *nil dicit*, was extended to authorize judgment on *cognovit*, as within its equity.<sup>186</sup> So it was held, that, under the laws of Massachusetts, the power of an administrator to sell his intestate's real estate, under an order of a court of probate, must be exercised within a reasonable time after the decedent's death, to be fixed by analogy to the statute of limitations.<sup>187</sup> And where an act regulating the levy and collection of taxes, and providing, *inter alia*, that lands sold for non-payment of such might be redeemed within a certain time upon payment of a certain penalty, was repealed by a later one changing the time for redemption and the amount of the penalty, but providing that the former act should remain in force for the collection of taxes levied thereunder, it was declared that an act in force for the collection of taxes, should be deemed in force for the purpose of redemption, provided the penalty fixed by it was tendered within the time prescribed by the old act.<sup>188</sup>]

(*a*) *Knight v. Farnaby*, 2 Salk. 670; 1 Saund. 74 (2); Tidd. Pr. c. 25.

<sup>186</sup> *Chandler v. Northrop*, 24 Barb. (N. Y.) 129.

<sup>187</sup> *Hoguet v. Wallace*, *supra*. In *State v. Manning*, 14 Tex. 402, a statute giving an appeal "when a judgment shall be given for the defendant on a motion to quash an indictment," was held to give an appeal where the indictment was abated by plea, the legal effect in both cases being the same.

<sup>187</sup> *Ricard v. Williams*, 7 Wheat.

59, following *Gore v. Brazier*, 3 Mass. 523, 542; *Wyman v. Brigden*, 4 Id. 150, 155; and *Summer v. Childs*, 2 Conn. 607, where, p. 615, it is said that statutes of limitations made in respect of real rights, whether corporeal or incorporeal, have always been extended by the courts to analogous cases. See, also, *McFarland v. Stone*, 17 Vt. 173. But see *Martin v. Robinson*, 67 Tex. 368, ante, § 20, note.

<sup>188</sup> *Wolfe v. Henderson*, 28 Ark. 304.

§ 328. **Acts Contrary to Natural Equity, etc.**—It was formerly asserted that a statute contrary to natural equity or reason (such as one which made a man a judge in his own case), or contrary to Magna Charta, was void; for, it was said, *jures naturæ sunt immutabilia*; they are *leges legum*; and an Act of Parliament can do no wrong (a). But such dicta cannot be supported. They stand as a beacon to be avoided, rather than as an authority to be followed (b).

The law on this subject cannot be better laid down than in the following words of a great American authority: "It is a principle in the English law that an Act of Parliament, delivered in clear and intelligible terms, cannot be questioned, or its authority controlled, in any court of justice. 'It is,' says Sir W. Blackstone, 'the exercise of the highest authority that the kingdom acknowledges upon earth.' When it is said in the books that a statute contrary to natural equity and reason, or repugnant, or impossible to be performed, is void, the cases are understood to mean that the Courts are to give the statute a reasonable construction. They will not readily presume, out of respect and duty to the lawgiver, that any very unjust or absurd consequence was within the contemplation of the law. But if it should happen to be too palpable in its direction to admit of but one construction, there is no doubt, in the English law, as to the binding efficacy of the statute. The will of the Legislature is the supreme law of the land, and demands perfect obedience.

"But while we admit this conclusion of the English law, we cannot but admire the intrepidity and powerful sense of justice which led Lord Coke, when Chief Justice of the King's Bench, to declare, as he did in Doctor Bonham's case, that the Common Law doth control Acts of Parliament, and adjudges them void when against common right and reason. The same sense of justice and freedom of opinion led Lord Chief Justice Hobart, in *Day v. Savadge*, to insist that an

(a) *Bonham's Case*, 8 Rep. 118a; *City of London v. Wood*, 12 Mod. 687; *Day v. Savadge*, Hob. 87; *Mercers v. Bowker*, 1 Stra. 639; 3 Inst. 111. So enacted as to Magna Charta by 42 Ed. 3, c. 1, Co. Litt. 81a. [In *Carpenter v. People*, 8

Col. 116, it is said that the court *may* interfere with a special act for bad faith or want of investigation on the part of the Legislature; but that such are not to be presumed.]

(b) See *per* Willes, J., in *Lee v Bude R. Co.*, L. R. 6 C. P. 582.

Act of Parliament made against natural equity, as to make a man judge in his own case, was void ; and induced Lord Chief Justice Holt to say, in the case of the City of London *v.* Wood, that the observation of Lord Coke was not extravagant, but was a very reasonable and true saying. Perhaps what Lord Coke said in his reports on this point may have been one of the many things that King James alluded to, when he said that in Coke's reports there were many dangerous conceits of his own uttered for law, to the prejudice of the crown, parliament, and subjects " (a).

(a) 1 Kent, Comm. 447.

## CHAPTER XII.

## STRICT CONSTRUCTION.

- § 329. The Rule of Strict Construction Applied to Penal Statutes.
- § 330. Results of Application of the Rule.
- § 331. What are Penal Laws.
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- § 334. Degree of Strictness to be Applied. Illustrations.
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- § 356. Acts Conferring Exemptions from Common Burdens or Surrendering Public Rights.

## § 329. The Rule of Strict Construction applied to Penal Statutes.

—The rule which requires that penal<sup>1</sup> and some other stat-

<sup>1</sup> See U. S. v. Hall, 6 Cranch, 171; U. S. v. Sheldon, 2 Wheat. 119; U. S. v. Starr, Hempt. 469; U. S. v. Dist. Spirits, 10 Blatchf. 428; U. S. v. Clayton, 2 Dill. 219; The Enterprise, 1 Paine, 32; Andrews v. U. S., 2 Story, 202; Whitney v. Emmett, Baldw. 303; Matter of Baker, 29 How. Pr. (N.Y.) 485; Hankins v. People, 106 Ill. 628; Bettis v. Taylor, 8 Port. (Ala.) 564; Gunter v. Leckey, 30 Ala. 591; Lair v. Killmer, 25 N. J. L. 522; State v. Newton (N. J.)

8 Centr. Rep. 623, 624; Philadelphia v. Davis, 6 Watts & Serg. (Pa.) 269; Gallagher v. Neal, 3 Pen. & W. (Pa.) 183; Warner v. Com'th, 1 Pa. St. 154; Bucher v. Com'th, 103 Id. 528; Simms v. Bean, 10 La. An. 346; State v. Whetstone, 13 Id. 376; Rawson v. State, 19 Conn. 292; Pierce's Case, 16 Me. 255; Hall v. State, 20 Ohio, 7; Ramsey v. Toy, 10 Id. 493; Steel v. State, 26 Ind. 82; West. Union Tel. Co. v. Steele, 108 Id. 163; State v. Solo-

utes shall be construed strictly was more rigorously applied in former times, when the number of capital offences was one hundred and sixty or more (*a*); when it was still punishable with death to cut down a cherry tree in an orchard, or to be seen for a month in the company of gipsies (*b*). But it has lost much of its force and importance in recent times, since it has become more and more generally recognized that the paramount duty of the judicial interpreter is to put upon the language of the Legislature, honestly and faithfully, its plain and rational meaning, and to promote its object. It was founded, however, on the tenderness of the law for the rights of individuals, and on the sound principle that it is for the Legislature, not the Court, to define a crime and ordain its punishment (*c*). It is unquestionably a reasonable expectation, that, when the former intends the infliction of suffering, or an encroachment on natural liberty or rights, or the grant of exceptional exemptions, powers, and privileges, it will not leave its intention to be gathered by mere doubtful inference, or convey it in "cloudy and dark words" only (*d*), [—for an offence cannot be created or inferred by vague implications<sup>2</sup>—] but will manifest it with reasonable clearness. The rule of strict construction does not, indeed, require or sanction that suspicious scrutiny of the words, or those hostile conclusions from their ambiguity, or from what is left unexpressed, which characterize the judicial interpretation of affidavits in support of *ex parte*

mons, 3 Hill (S. C.) 96; Hines v. R. R. Co., 95 N. C. 434; Elam v. Rawson, 21 Ga. 139; Gibson v. State, 38 Id. 571; Horner v. State, 1 Oreg. 267; Bish., Wr. L., §§ 196, 226 et seq. An ordinance penal in its nature is equally subject to the rule of strict construction: Pacific v. Seifert, 79 Mo. 210. In the case of Hankins v. People, 106 Ill. 628, the rule of strict construction of penal statutes in the sense in which alone it is respectable (see *infra*) was asserted in the face of a statutory rule of construction that "all general provisions, terms, phrases and expressions shall be literally construed, in order that the true intent and meaning of the Legislature may be

fully carried into effect,"—a provision, which, it was there said, though applying to all statutes, does not require the court to bring cases of a like nature, not named in terms, or by implication, into a statute, nor yet to give a narrow and restricted meaning to the language employed, but fairly and reasonably to carry out the legislative intent.

(*a*) 4 Bl. Comm. 18. According to Sir S. Romilly, it was, in his time, two hundred and thirty.

(*b*) 4 Bl. Comm. 4.

(*c*) U. S. v. Wiltberger, 5 Wheat. 95.

(*d*) 4 Inst. 332.

<sup>2</sup> Atlanta v. White, 33 Ga. 229.



applications (a), or of magistrates' convictions, where the ambiguity goes to the jurisdiction (b). Nor does it allow the imposition of a restricted meaning on the words, wherever any doubt can be suggested, [or an ambiguity imagined,<sup>3</sup>] for the purpose of withdrawing from the operation of the statute a case which falls both within its scope and the fair sense of its language. This would be to defeat, not to promote, the object of the Legislature (c); to misread the statute and misunderstand its purpose (d). A Court is not at liberty to put limitations on general words which are not called for by the sense, or the objects, or the mischiefs of the enactment (e); [nor so to narrow the construction as to exclude cases which the words of the statute, in their ordinary acceptation and plain meaning, or in the sense in which the Legislature obviously used them, would comprehend;<sup>4</sup>] and no construction is admissible which would sanction an evasion of an act (f), [or would defeat the obvious intention of the Legislature.<sup>5</sup> In order to avoid such a result, as has been seen, it is even allowable to reject what is clearly surplusage in an act.\* "It is true that a penal law must be construed strictly, and according to its letter. But

(a) See *ex. gr.* *Perks v. Severn*, 7 East, 194; *Fricke v. Poole*, 9 B. & C. 543.

(b) See *R. v. Davis*, 5 B. & Ad. 551; *R. v. Jones*, 12 A. & E. 684; *per Coleridge, J.*, in *R. v. Toke*, 8 A. & E. 227; *per cur.* in *Lindsay v. Leigh*, 11 Q. B. 465; *R. v. Stainforth*, *Id.* 75; *Fletcher v. Calthrop*, 6 Q. B. 880.

<sup>3</sup> See *Com'th v. Martin*, 17 Mass. 359; *Com'th v. Keniston*, 5 Pick. (Mass.) 420.

(c) *Bac. Ab. Stat. I. 9*; *R. v. Hodnett*, 1 T. R. 101.

(d) *Per Martin, B.*, in *Nicholson v. Fields*, 31 L. J. Ex. 236, 7 H. & N. 710; and *Bramwell, B.*, in *Foley v. Fletcher*, 3 H. & N. 781.

(e) *U. S. v. Coombs*, 12 Peters, 80.

<sup>4</sup> *U. S. v. Wilson*, *Baldw.* 78; *State v. Lovell*, 23 Iowa 304; *Huffman v. State*, 29 Ala. 40; *Walton v. State*, 62 *Id.* 197; *Pike v. Jenkins*, 12 N. H. 255.

(f) *Com. Dig. Parl. R.* 28; *Bac.*

*Ab. Stat. J.*; 2 Rol. 127. *Per cur.* in *U. S. v. Wiltberger*, 5 Wheat. 95; *U. S. v. Gooding*, 12 Wheat. 460; *American Fur Co. v. U. S.*, 2 Peters, 367; *U. S. v. Coombs*, 12 Peters, 80; *U. S. v. Hartwell*, 6 Wallace, 395.

<sup>5</sup> See *U. S. v. Wiltberger*, *supra*; *Amer. Fur Co. v. U. S.*, *supra*; *U. S. v. Morris*, 14 Pet. 464; *U. S. v. 84 Boxes of sugar*, 7 *Id.* 453; *Jones v. Estis*, 2 Johns. (N. Y.) 379; *Sprague v. Birdsall*, 2 Cow. (N. Y.) 419; *Com'th v. Loring*, 8 Pick. (Mass.) 370; *Reed v. Davis*, *Id.* 514; *Crosby v. Hawthorn*, 25 Ala. 221; *Broadwell v. Conger*, 2 N. J. L. 210; *Bartolett v. Achey*, 38 Pa. St. 273; *Daggett v. State*, 4 Conn. 61; *State v. Main*, 31 *Id.* 572; *Butler v. Ricker*, 6 Greenl. (Me.) 268; *Parkinson v. State*, 14 Md. 184; *Doe v. Avaline*, 8 Ind. 6; *Hines v. R. R. Co.*, 95 N. C. 434; *Bish., Wr. L.*, § 237.

<sup>6</sup> See *ante*, § 302, *U. S. v. Stern*, 5 Blatchf. 512.

this strictness, which has run into an aphorism, means no more than that it is to be interpreted according to its language. Literal interpretation is but a figurative expression, meaning, perhaps, that we are to adhere so closely to the language, we are not to change the signification by dropping even a letter. The purpose of the rule is to prevent acts from being brought within the scope of punishment, because courts may suppose they fall within the spirit of the law, though not within its terms.” The strictness, then, with which acts falling under the rule of strict construction are to be interpreted, is what in one place is called a “reasonable strictness.”<sup>8</sup> “It is not the exact converse of liberal construction, and does not consist in giving words the narrowest meaning of which they are susceptible.”<sup>9</sup> The meaning of the rule is, “that acts of this kind are not to be regarded as including anything which is not within their letter as well as their spirit,”<sup>10</sup> which is not clearly and intelligibly described in the very words of the statute, as well as manifestly intended by the Legislature.”<sup>11</sup> That is,] the rule of strict construction requires that the language shall be so construed that no cases shall be held to fall within it which do not fall both within the reasonable meaning of its terms and within the spirit and scope of the enactment (*a*). To determine that a case is within the intention of a statute, its language must authorize the Court to say so; but it is not admissible to carry the principle that a case which is within the mischief of a statute is within its provisions, so far as to punish a crime not specified in the statute, because it is of equal atrocity or of a kindred character with those which are enumerated (*b*). [In this characteristic, the difference between liberal and strict constructions is clearly presented. Whilst the letter of a remedial statute may be extended to

<sup>7</sup> *Com'th v. Cooke*, 50 Pa. St. 201, 207.

<sup>8</sup> *Chapin v. Persse, etc.*, Works, 30 Conn. 461.

<sup>9</sup> *Wilb.*, p. 246; and see *State v. Powers*, 36 Conn. 77.

<sup>10</sup> See *Dewey v. Goodenough*, 56 Barb. (N. Y.) 54.

<sup>11</sup> *Wilb.*, p. 246.

(*a*) *Per Best, C. J.*, in *Fletcher*

*v. Sondes*, 3 Bing. 580; *Bracey's Case*, 1 Salk. 348; *R. v. Harvey*, 1 Wils. 164; *Dawes v. Painter*, Freem. K. B. 175; *Scott v. Pacquet*, L. R. 1 P. C. 552; *Ellis v. McCormick*, L. R. 4 Q. B. 271; *The Gauntlett*, L. R. 4 P. C. 191, *per James, L. J.*

(*b*) *U. S. v. Wiltberger*, 5 Wheat. 96. [*U. S. v. Ragsdale*, Hempst. 497.]

cases clearly within the same reason and within the mischief the act was designed to cure, unless such construction does violence to the language, a consideration of the old law, the mischief and the remedy, though proper in the construction of criminal as well as other statutes,<sup>12</sup> is not in itself enough to bring a case within the operation of the former class of statutes; their language, properly given its full meaning, must, at least by that meaning, expressly include the case; and in ascertaining that meaning the court cannot go beyond the plain meaning of the words and phraseology employed in search of an intention not certainly implied in them.<sup>13</sup> In other words, whilst a case may come within the purview of a remedial statute unless its language, properly construed, excludes it, it is excluded from the reach of a criminal statute, unless the language includes it:<sup>14</sup> unless the proper meaning of the language of the statute brings a case within its letter, the rule of strict construction forbids the court to create a crime or penalty by construction, and requires it to avoid the same by construction;<sup>15</sup> and, although the court may be unable to conceive any reason why the case in question should have been omitted, and considers it highly improbable that an omission was intended,<sup>16</sup> it is not at liberty to extend the enactment to cases not included within the clear and obvious import of the language;<sup>17</sup> so that, for instance, under an act, which, in its eighth section provided for the punishment of certain offences, among which manslaughter was not mentioned, committed upon the high seas, or in any river, haven, basin or bay, and in section twelve, punished manslaughter on the high seas, no indictment could be maintained against one for manslaughter committed on board an American vessel, in the River Tigris, in China, sixty-five miles from its mouth.<sup>18</sup> If the Legislature has not used words sufficiently comprehensive to include within its prohibition all the cases which

<sup>12</sup> See ante, § 27; post, § 337.

<sup>13</sup> *Hines v. R. R. Co.*, 95 N. C. 434.

<sup>14</sup> *State v. Powers*, 36 Conn. 77.

<sup>15</sup> *West. Un. Telegr. Co. v. Axtell*, 69 Ind. 199; *Lair v. Killmer*, 25 N. J. L. 522; *Com'th v.*

*Cooke*, supra; *Philadelphia v. Wright*, 4 Phila. (Pa.) 138.

<sup>16</sup> *U. S. v. Wiltberger*, 5 Wheat. 76, 105.

<sup>17</sup> *Ibid.*; *U. S. v. Ragsdale*, Hempst. 497; *State v. Peters*, 37 La. An. 730.

<sup>18</sup> *U. S. v. Wiltberger*, supra.

fall within the mischief intended to be prevented, it is not competent to a Court to extend them (*a*); [nor to extend the grammatical and natural meaning of the terms as used by the Legislature even on a plea of a resulting failure of justice.<sup>1</sup>

§ 330. **Results of Application of the Rule.**—[It may be here added that the rule of strict construction, in the case of penal statutes, requires, that, where an act contains such an ambiguity as to leave reasonable doubt of its meaning, it is the duty of the court not to inflict the penalty;<sup>20</sup> that where it admits of two constructions, that which operates in favor of life or liberty is to be preferred;<sup>21</sup> that, where a statute is silent as to the place of imprisonment, there being county jails for persons guilty of misdemeanors, and the penitentiary for those guilty of higher crimes, the former, rendering the punishment less severe, is to be chosen;<sup>22</sup> and that, where notice is required by an ordinance imposing a fine, a personal notice is to be intended.<sup>23</sup>]

§ 331. **What are Penal Laws.**—It is immaterial, for the purpose of the application of the rule of strict construction, whether the proceeding prescribed for the enforcement of the penal law be criminal or civil (*b*). [Thus, an act giving a party injured a civil action for the recovery of a penalty imposed upon a public officer for charging illegal fees, is a penal act: so that the taking of excessive fees by a person after the expiration of his office, for services done while in office, is beyond the reach of the act.<sup>24</sup> So, too, acts have

(*a*) *Per* Lord Tenterden in *Proctor v. Manwaring*, 3 B. & A. 145.

<sup>19</sup> *Remington v. State*, 1 Oreg. 281.

<sup>20</sup> *Com'th v. Standard Oil Co.*, 101 Pa. St. 119, 150 (cit. *The Enterprise*, 1 Paine, 32); *Hines v. R. R. Co.*, 95 N. C. 434.

<sup>21</sup> *Com'th v. Martin*, 17 Mass. 359; *Com'th v. Keniston*, 5 Pick. (Mass.) 420.

<sup>22</sup> *Horner v. State*, 1 Oreg. 267.

<sup>23</sup> *St. Louis v. Goebel*, 32 Mo., 295. See *Marston v. Tryon*, 108 Pa. St. 270, post, § 331. But a reference to crimes punishable in the state prison, includes those that

may, as well as those that must be so punished: *State v. Mayberry*, 48 Me. 218. See post, § 339.

(*b*) *Henderson v. Sherborne*, 2 M. & W. 236; *Nicholson v. Fields*, 7 H. & N. 810; *Fletcher v. Hudson*, 51 L. J. Q. B. 48; *The Bolina*, 1 Gallison, 83, *per* Story, J.

<sup>24</sup> *Aechternacht v. Watmough*, 8 Watts & S. (Pa.) 162, overruling *Jackson v. Purdue*, 3 Pen. & W. (Pa.) 519, and apparently at variance with *Ordway v. Centr. Nat. B'k*, 47 Md. 217, where an act is deemed penal only when the right of enforcing the penalty is given to the public or the Government, not

been held penal, and subject to the rule of strict construction, which impose upon a party neglecting within a certain time after notice to him to enter, by himself or his attorney, satisfaction of a judgment paid with costs, a forfeiture of one-half the debt, to be recovered by the defendant;<sup>25</sup> (so that a notice to the plaintiff's attorney, not to the plaintiff himself, would not entitle the defendant to maintain the action for the penalty<sup>26</sup>): which authorized the addition of a percentage to a tax assessed against a party, upon failure to make a certain report or return required by the act;<sup>27</sup> or imposed a liability for interest at the rate of twelve per cent. per annum for non-payment within a certain period after it was due, and notice thereof was given, and demand made for the same:<sup>28</sup> acts which make a party liable to judgment for double the amount of the damages found by the jury;<sup>29</sup> or to double or treble damages;<sup>30</sup> though the suit may have none of the characteristics of a criminal prosecution;<sup>31</sup> and acts concerning contempts.<sup>32</sup> It is not necessary that the statute should, like statutes of the class last enumerated, denominate the liability to which a person is subjected by it a penalty or forfeiture. Wherever a person in a particular relation, *e. g.*, as the officer of a company, is, as such, made liable to the payment of money, either as the result of the omission of something, the performance of which is enjoined upon him, or for the commission of an act prohibited, where, but for the omission of the enjoined, or the doing of the forbidden act, he would be under no such liability, the imposition of the latter is, so far as he is concerned, by way of punishment, and the act is, as to him, penal.<sup>33</sup> Nor, on the other hand, is every statute

when it is given to the party grieved.

<sup>25</sup> *Marston v. Tryon*, 103 Pa. St. 270.

<sup>26</sup> *Ibid.* See *St. Louis v. Goebel*, 32 Mo. 295, ante, § 330. See § 74.

<sup>27</sup> *Com'th v. Standard Oil Co.*, 101 Pa. St. 119, 150.

<sup>28</sup> *Ibid.* But a percentage thus added becomes part of the tax, lentitled to the same priority the law gives to the latter over other liens on land: *Titusville's App.*, 108 Pa. St. 600.

<sup>29</sup> *Bay City, etc., R. R. Co. v. Austin*, 21 Mich. 390.

<sup>30</sup> *Reed v. Davis*, 8 Pick. (Mass.) 515; *Cole v. Groves*, 134 Mass. 471; *Cohn v. Neeves*, 40 Wis. 393, and see *Bayard v. Smith*, 17 Wend. (N. Y.) 83; *Suffolk B'k v. Worcester B'k*, 5 Pick. (Mass.) 106; *Palmer v. York B'k*, 18 Me. 166.

<sup>31</sup> *Reed v. Northfield*, 13 Pick. (Mass.) 94.

<sup>32</sup> *Maxwell v. Rives*, 11 Nev. 213.

<sup>33</sup> *Merchant's B'k v. Bliss*, 13 Abb. Pr. (N. Y.) 225; 21 Id. 365.

relating to the administration of the criminal law necessarily penal and to be construed as such ; as, *e. g.*, an act relating to offences committed on board of boats navigating a river or canal, not creating the offences, nor prescribing their punishment, or altering the mode of trial, but simply declaring that an indictment for such an offence may be found in any county through which the boat may pass.<sup>34</sup>

§ 332. **Acts Partly Penal. Frauds.**—[It is quite possible, that, in the same statute, both the strict and the liberal construction may be applied. It has been said, indeed, that, where an act is, both penal and remedial, it will be strictly construed,<sup>35</sup> as *e. g.*, an act allowing one occupant double the value of a fence built by him for the other on account of the latter's neglect to repair,<sup>36</sup> or a statute authorizing arrest and imprisonment for debt.<sup>37</sup> But "there is no impropriety in putting a strict construction on a penal clause, and a liberal construction on a remedial clause, in the same act."<sup>38</sup> Thus, where an act, in the nature of a police regulation, such as requires fencing along railroads, etc., gives a remedy for a private injury resulting from its violation, and also imposes fines and penalties for the same, as an offence against, and at the suit of, the public, it has been held that the former provision, giving damages to persons whose stock is injured, will not be regarded as penal, nor the recovery thereunder treated as a penalty, unless expressly so declared.<sup>39</sup> And it is said,<sup>40</sup> and has, indeed, already been intimated,<sup>41</sup> that a proviso in a penal statute, which is favorable to the defendant, is to be liberally interpreted in his behalf.

§ 333. [In construing statutes against frauds, it has been said, that, where the statute acts against the offender and inflicts a penalty, it is to be strictly construed ; but where it acts upon the offence by setting aside the fraudulent transaction, it is to be construed liberally.<sup>42</sup> An instance of this

<sup>34</sup> *People v. Hulse*, 3 Hill (N.Y.) 309.

<sup>35</sup> *Abbott v. Wood*, 22 Me. 541.

<sup>36</sup> *Id.*

<sup>37</sup> *Archway v. Johnson*, 56 N.Y. 98.

<sup>38</sup> *Butt v. Hubbard*, 2 Bing. 349,

355, per Best, C. J.

<sup>39</sup> *Pittsb., etc., R. R. Co. v. Methven*, 21 Ohio St. 586.

<sup>40</sup> See *Bish., Wr. L.*, §§ 196, 226.

<sup>41</sup> *Ante*, § 186.

<sup>42</sup> *Gorton v. Champneys*, 1 Bing. at p. 301; *Cumming v. Fryer*,

construction is afforded by the decisions under the 9 Anne, c. 14, against gaming, which was held to be remedial when an action was brought by the party injured, but penal, when an action was brought by a common informer." It has been said, somewhat vaguely, in this country, that "a statute which is penal as to some persons, provided it is beneficial generally, may be equitably construed;"<sup>43</sup> and that "laws enacted for the prevention of fraud, for the suppression of a public wrong, or to effect a public good, are not, in the strict sense, penal acts, although they may inflict a penalty for violating them;"<sup>44</sup> and upon that principle, revenue laws were held not to be penal, nor subject to the rules of strict construction, but to require such interpretation "as most effectually to accomplish the intention of the Legislature in passing them;"<sup>45</sup> and in Maine, an act giving damages against any person assisting a debtor to defraud his creditor, to double the amount of the property fraudulently concealed or transferred, was held not to be a penal statute." No doubt, "where grievances have to be redressed, or property to be protected, there are offenders as well as sufferers, assailants as well as assailed. The act which gives a remedy to one who is aggrieved almost inevitably inflicts a penalty on his opponent; 'every statute is penal to somebody.' But if the primary object of the act is redress, and not punishment, it is to be construed liberally. 'The legal distinction between remedial and penal statutes is this: that the former give relief to the parties grieved, the latter impose penalties upon

Dudley (Ga.) 182; Bish., Wr. L., § 192, referring to *Cumming v. Fryer*, supra; *Carey v. Giles*, 9 Ga. 253; *Smith v. Moffat*, 1 Barb. (N. Y.) 65; *Ellis v. Whitlock*, 10 Mo. 781. And see *Hahn v. Salmon*, 20 Fed. Rep. 301. The liberal construction of statutes against usury seems, as least in part, based upon this principle. See *Gray v. Bennett*, 3 Met. (Mass.) 522.

<sup>43</sup> *Bones v. Booth*, 2 W. Bl. 1226.

<sup>44</sup> *Sickles v. Sharp*, 13 Johns. (N. Y.) 497.

<sup>45</sup> *Taylor v. U. S.*, 3 How. 197.

<sup>46</sup> *Ibid.* See post, § 346. Mr. Sedgwick, in his work on the Con-

struction of Statutes, etc., makes the following note to the above utterance: "It may be permitted to us to ask with deference, whether all laws must not be supposed intended to 'effect a public good;' and whether the effort 'to accomplish the intention of the Legislature' should be any more earnest in this case than in all others." Certainly, criminal laws are most emphatically intended to "effect a public good,"—the more highly penal, the greater the good.

<sup>47</sup> *Frohock v. Pattee*, 38 Me. 103. Comp. ante, § 330.

offences committed.' ”<sup>48</sup> It would follow that the construction should be strict or liberal, accordingly as the design to give redress or to impose penalties should appear to lie at the bottom of the enactment ; or strict as to one part and liberal as to another, where severable, if the one is confined to punishment, and the other extends to redress.]

§ 334. **Degree of Strictness to be Applied. Illustrations.**—The degree of strictness applied to the construction of a penal statute depended in great measure on the severity of the statute. When it merely imposed a pecuniary penalty, it was construed less strictly than where the rule was invoked in *favorem vitæ*.<sup>49</sup> But the rule of strict construction requires, at least, that no case shall fall within a penal statute which does not comprise all the elements which, whether morally material or not, are in fact made to constitute the offence as defined by the statute. [It is not intended to make this chapter a treatise upon criminal statute law, or to examine, with any degree of minuteness, the decisions upon, and in construction of, such statutes. An attempt to do so would lead to proportions entirely incompatible with the general scope of this work, and would trench, to a corresponding extent, upon the province of works upon that particular subject. All that is here designed is to lay down those general principles, belonging distinctively within the limits of a work upon the interpretation of statutes, without the statement of which a discussion of this subject would remain incomplete, and to cite a few instances merely, illustrative of the propositions laid down, referring the reader, for a more exhaustive examination and detailed comparison of decisions, to such works as Mr. Bishop's *Treatise upon Statutory Crimes*. As an illustration, then, of the principle just stated, it may be remembered that] a person cannot be convicted of perjury if the oath was administered by one who had not legal authority to administer it, as in the case of an affidavit in the

<sup>48</sup> Wilb., pp. 232-233, cit. *Platt v. Sheriffs of London*, Plowd. at p. 36, and *Huntingtower v. Gardiner*, 1 B. & C. at p. 299.

<sup>49</sup> It is, indeed, intimated, in *Randolph v. State*, 9 Tex. 521,

that the rule of strict construction is confined to criminal statutes of a highly penal character, and has no application in the construction of acts creating or punishing mere misdemeanors.



Admiralty sworn before a Master in Chancery, though the Admiralty was in the habit of admitting affidavits so sworn (a). An act which made it penal to personate "any person entitled to vote" would not be violated by personating a dead voter (b); [nor an act prohibiting, under penalties, a person from "voting at any election who is not entitled," or "out of the county, or city, or town of his residence," by a voter's voting at an election for municipal officers out of the ward of his residence.<sup>60</sup>] An agent entrusted with money to invest on mortgage is not liable to conviction for embezzling it, under an Act which makes it a misdemeanor in an agent to misappropriate property entrusted to him "for safe custody" (c). [Nor does an act making the embezzlement or fraudulent conversion of money, goods, etc., to be carried for hire, larceny, cover the case of such misappropriation of goods received on storage.<sup>61</sup>] The Act which punishes the administration of a noxious drug would not include a substance which is not in itself poisonous, but noxious only when given in excess, as cantharides (d). The Metropolis Local Management Act of 1862, in incorporating the powers for the "suppression" of nuisances, conferred by an earlier local Act, which contained, besides several provisions forgetting rid of existing nuisances, a prohibition against keeping pigs, was held not to have comprised this last provision, as the effect of it was, not to "suppress," but to prevent the creation of nuisances (e). Where an Act, after providing, by one section, that any building, built or rebuilt, except on the site of a former dwelling, should not be "used" as a dwelling, unless there was an open space of twenty feet in front of it, without the previous consent of the local board, imposed, by another, a penalty if any building or work were "made or suffered to continue" contrary to the provisions of

(a) *R. v. Stone*, 23 L. J. M. C. 14. [*S. P.*, *Shaffer v. Kintzer*, 1 Binn. (Pa.) 537; *Phillipi v. Bowen*, 2 Pa. St. 20.]

(b) *Whiteley v. Chappell*, L. R. 4 Q. B. 147. See, also, *R. v. Brown*, 2 East, P. C. 1007. It would be different if the offence were personating a person "supposed to be entitled to vote:" *R. v. Martin*,

*R. & R.* 324.

<sup>60</sup> *Nettles v. State*, 49 Ala. 35. (c) 24 & 25 Vict. c. 96, s. 76; *R. v. Newman*, 51 L. J. M. C. 87.

<sup>61</sup> *State v. Stoller*, 38 Iowa, 321.

(d) *R. v. Hennah*, 13 Cox, 547.

(e) *Chelsea Vestry v. King*, 17 C. B. N. S. 625; 34 L. J. M. C. 9. See *Great Western R. Co. v. Bishop*, L. R. 7 Q. B. 550.

the Act; the Court refused to construe the latter section as including the offences prohibited in the former, though the effect of the decision was to leave them without specific provision for their punishment (*a*). [An act imposing a penalty for breach of duty in case of bad faith, partiality or discrimination, does not punish a mere act of neglect.<sup>62</sup>]

§ 335. **Exclusion of New Things by Rule of Strict Construction.**—Again, as illustrative of the rule of strict construction, it has been said that while remedial laws may extend to new things not in esse at the time of making the statute (*b*), penal laws may not. Thus, the 30 Eliz. c. 12, which took away the benefit of clergy from accessories after, as well as before, the fact, was held not to extend to accessories made by subsequent enactment. The receiver, therefore, of a stolen horse, who was made an accessory by a later statute, was held not ousted (*c*). Where one Act (24 & 25 Vict. c. 96, s. 91) made it felony to receive with guilty knowledge a chattel, the stealing of which was felony either at common law or under that Act; and a subsequent one (31 & 32 Vict. c. 116) made a partner who stole partnership property liable to conviction for the stealing, as though he had not been a partner; it was held that to receive such stolen property was not an offence under the earlier Act (*d*). The Stock Jobbing Act, which, after referring, in the preamble, to the great inconveniences which had arisen, and daily arose by the wicked practice of stock jobbing—diverting men from their ordinary pursuits, ruining families, discouraging industry, and injuring commerce—declared void all such contracts “in any public or joint stock, or other public securities whatsoever,” was held, notwithstanding the mischief in view, and the wide terms used, not to apply to transactions

(*a*) *Pearson v. Hull*, 3 H. & C. 921, 35 L. J. M. C. 44; diss. Martin, B. See another example in *Elliott v. Majendie*, L. R. 7 Q. B. 429.

<sup>62</sup> *West. Union Tel. Co. v. Steele*, 108 Ind. 163. Whether under the act referred to, relating to the sending of telegraphic messages, the sender alone (See *W. U. Tel. Co. v. Pendleton*, 95 Ind. 12 ;

*W. U. T. Co. v. Reed*, 96 Id. 195; *W. U. T. Co. v. Kinney*, 106 Id. 468) or any one other than the sender could recover the penalty, was not decided in this case.

(*b*) 2 Inst. 35; *per cur.* in *Dawes v. Painter*, Freem. K. B. 176. Sup. § 112.

(*c*) *Fost. Cr. L.* 372. See § 85.

(*d*) *R. v. Smith*, L. R. 1 C. C. 270.

in foreign funds (a) or in railway shares (b), on the ground that the former were not dealt in, and the latter were not known in, England, when the Act was passed. [Nor does an act making void securities given for money lost in "cock-fighting, bullet-playing, or horse-racing, or at or upon any game of address, game of hazzard, play or game whatsoever," embrace a bond given by way of margin in a stock-gambling transaction ;<sup>53</sup> although the transaction is clearly a gambling transaction.<sup>54</sup> Upon the same principle, at least in part, a wager upon the result of a primary election was held not to be a penal offence within the Pennsylvania acts of 1817 and 1839, punishing wagers upon the results of elections, since, at the time of the passage of those acts, "primary elections" were unknown in that state.<sup>55</sup>] But the degree of strictness [indicated by the English decisions above referred to] may be regarded as extreme. It could hardly be contended that printing a treasonable pamphlet was not an offence against the statute of Edw. 3, because printing was not invented until a century after it was passed ; or that it would not be treason to shoot the Queen with a pistol, or poison her with an American drug (c). The 55 Geo. 3, c. 58, s. 2, which enacts that no brewer or dealer in beer shall have, or put into beer, any liquor for darkening its color, or use molasses or any preparation in lieu of malt and hops, under a penalty of 200*l.*, was held not to be confined to such dealers as were known at the time when the Act was passed, viz., licensed victuallers, licensed by a magistrate under the Act of 5 & 6 Edw. 6, c. 25 ; but to include the retailer of beer furnished with an excise license, who first came into legal existence under the 1 Wm.

(a) 7 Geo. 2, c. 8, repealed by 23 Vict. c. 28 ; *Henderson v. Bise*, 3 Stark. 158 ; *Wells v. Porter*, 2 Bing. N. C. 722 ; comp. *Smith v. Lindo*, 5 C. B. N. S. 587, 27 L. J. 196.

(b) *Hewitt v. Price*, 4 M. & Gr. 355.

<sup>53</sup> *Griffiths v. Sears*, 112 Pa. St. 523.

<sup>54</sup> *Ibid.* ; *McCormick v. Nichols*, 19 Ill. App. 334 ; and see ante, § 138.

<sup>55</sup> *Com'th v. Wells*, 110 Pa. St. 463. See ante, § 100, and note 182

to same, and *Com'th v. Howe*, 144 Mass. 144, there cited. In *Com'th v. Wells*, supra, the construction excluding primary elections was confirmed by reference to the object of the enactments, and the context thereof ; and it was said that the act of 1881, regulating and punishing frauds in primary elections did not bring the latter within the purview of the act of 1839. Comp. post, § 338, *Britt v. Robinson*, L. R. 5 C. P. 503.

(c) *Hallam*, Const. Hist. c. 15.

4, c. 64 (a). The 8 Anne, c. 7, which enacted that if any sort of prohibited goods should be landed without payment of duty, the offender should forfeit treble value, was held to extend to gloves, which were not prohibited until the 6 Geo. 3 (b). A market Act which prohibited the sale of provisions in any part of the town but the market place, would extend to parts of the town built after the Act was passed on what were then fields (c). It was held that the 8 Geo. 2, c. 13, which imposed a penalty for piratically engraving, etching, or otherwise, or "in any other manner," copying prints and engravings, applied to copying by photography, though that process was not invented till more than a century after the Act was passed (d). Bicycles were held to be carriages within the provision of the Highway Act against furious driving, and tricycles propelled by steam to be locomotives within the Locomotive Act of 1865, though not invented when those Acts were passed (e).

§ 336. **Treatment of Omissions in Acts within Rule of Strict Construction.**—The general principle in question is well exemplified by comparing the manner in which an omission which, it was inferable from the text, was the result of accident, has been generally dealt with in penal and in remedial Acts. Thus, where the owner of mines was required, under a penalty, in case (1) of loss of life in the mine by accident, or (2) of personal injury arising from explosion, to send notice of such accident to an inspector within twenty-four hours "from the loss of life" (omitting the case of personal injury), the Court refused to supply, in order to make the defendant liable to a conviction, the obvious omission in the latter branch of the sentence, and held that notice was not necessary when personal injury from explosion, short of loss of life, had occurred; although the mention of such injury in the earlier part of the sentence

(a) *Atty.-Genl. v. Lockwood*, 9 M. & W. 378.

(b) *Atty.-Genl. v. Sagers*, 1 Pri. 182.

(c) *Collier v. Worth*, 1 Ex. D. 464. See *R. v. Cottle*, 16 Q. B. 412, and *Milton v. Faversham*, 10 B. & S. 548.

(d) *Gambart v. Ball*, 14 C. B. N. S. 306, 32 L. J. 166; *Graves v. Ashford*, L. R. 2 C. P. 410.

(e) *Taylor v. Goodwin*, 4 Q. B. D. 228; *Parkins v. Preist*, 7 Q. B. D. 313. [Comp., on this subject, ante, § 112.]

was idle and insensible without such an interpolation (*a*). The 5 & 6 W. 4, c. 63, s. 28, which empowered inspectors to examine "weights, measures, and scales," in shops, and if upon examination it appeared that "the said weights or measures" (omitting scales) were light or unjust, to seize them, was held not to authorize a seizure of scales (*b*). [So, acts for testing weights and measures and imposing a penalty for "selling" with unmarked weights and measures, will not apply to "buying" with such weight or measures.<sup>66</sup>] The Municipal Corporations Act of William 4, after empowering the borough justices to appoint a clerk to the justices, provided that it should not be lawful to appoint to that office any alderman or councillor, and provided that the clerk should not prosecute any offender committed for trial, enacted that any person "being an alderman or councillor" who should act as clerk to the justices, or "shall otherwise offend in the premises," should forfeit 100*l.*, recoverable by action. This clearly did not reach a clerk who prosecuted offenders committed by the justices, if he was not an alderman or councillor; and yet the manifest intention seemed to be that he should be subject to the penalty for either or both offences, of acting if disqualified, and of prosecuting. But to effectuate this intention, it would have been necessary to interpolate the words "any other person who" before "shall otherwise offend;" and this the Court refused to do for the purpose of bringing a person within the penal enactment (*c*); though also relieving him from indictment (*d*). So, the Court refused to supply a *casus omissus* under the Vaccination Act of 1871, as it was an enactment creating an offence (*e*). If the statutes, in these cases, had been remedial, the omission would probably have been supplied (*f*).

(*a*) *Underhill v. Longridge*, 29 L. J. M. C. 65; comp. *Williams v. Evans*, 1 Ex. D. 277, cited *inf.* § 338.

(*b*) *Thomas v. Stephenson*, 2 E. & B. 108, 22 L. J. 258. [See *Emerson v. Com'th*, 108 Pa. St. 111, post, § 353, as to "natural gas" companies.]

<sup>66</sup> *Southw. R. R. Co. v. Cohen*, 49 Ga. 627. See, also, *Chaffer's App.*, 56 Mich. 244, post, § 343.

(*c*) *Coe v. Lawrence*, 1 E. & B. 516, 22 L. J. 140.

(*d*) *Per Coleridge, J.* See, also, *R. v. Davis*, L. R. 4 C. C. 272. See *Exp. National Merc. Bank*, 15 Ch. D. 42, sup. § 20.

(*e*) *Broadhead v. Holdsworth*, 2 Ex. D. 321.

(*f*) *Re Wainwright*, 1 Phil. 258, sup. p. 303. [Comp., upon this subject, ante, § 299, and cases there cited.]

§ 337. **Qualifications of Rule of Strict Construction. Modern Tendency.**—The rule of strict construction, however, whenever invoked, comes attended with qualifications and other rules no less important; and it is by the light which each contributes that the meaning must be determined (a). Among them is the rule that that sense of the words is to be adopted which best harmonizes with the context, and promotes in the fullest manner the policy and object of the Legislature.<sup>87</sup> [It is said that words descriptive of an offence or its punishment, are not to be bent on the one side or the other.<sup>88</sup> They are to be construed by reference to the subject-matter,<sup>89</sup> and the context, the apparent policy and objects of the Legislature;<sup>90</sup> by the whole context, not by a mere division into sections, so as to give effect to the objects and intent of the whole,<sup>91</sup> as well as by a comparison of statutes in *pari materia*,<sup>92</sup> and consequently, the old law, the mischief and the remedy.<sup>93</sup>] The paramount object, in construing penal as well as other statutes, is to ascertain the legislative intent; and the rule of strict construction is not violated by permitting the words to have their full meaning, or the more extensive of two meanings, when best effectuating the intention (b). They are, indeed, frequently taken [not in their strict technical sense, if that would defeat, but in a more popular sense, if that will uphold, and carry out, the intention of the Legislature,<sup>94</sup> but] in the widest sense, sometimes even in a sense more wide than etymologically belongs or is popularly attached to them, in order to carry out effectually the legislative intent, or, to use Lord Coke's words, to suppress the mischief and advance the remedy (c). [Nor is the rule of strict construction ever violated by permitting the words of a statute to have their full meaning,<sup>95</sup> or by the application

(a) *Per cur.* in *U. S. v. Hartwell*, 6 Wallace, 385, 395.

<sup>87</sup> *Ibid.*

<sup>88</sup> *Mayor v. Davis*, 6 Watts & S. (Pa.) 269, 277, *per* Gibson, C. J.

<sup>89</sup> *Ibid.*; *Com'th v. Loring*, 8 Pick. (Mass.) 370, 373; *R. v. Hodnett*, 1 T. R. 96.

<sup>90</sup> *Pike v. Jenkins*, 12 N. H. 255.

<sup>91</sup> *The Harriet*, 1 Story, 251.

<sup>92</sup> *Mayor v. Davis*, *supra*.

<sup>93</sup> See *Ibid.*; *ante*, § 28.

(b) *U. S. v. Hartwell*, 6 Wall. 385, 395. [And see *Morehead v. B'k*, 41 N. J. Eq. 664.]

<sup>94</sup> See *U. S. v. Athens Armory*, 2 Abb. U. S. 129, where "prize" and "capture" were held not confined to captures at sea.

(c) *Heydon's Case*, 3 Rep. 7b. [And see *Parkinson v. State*, 14 Md. 184.]

<sup>95</sup> *State v. Powers*, 36 Conn. 77.

of common sense to its terms, in order to avoid an absurdity.<sup>66</sup> They are, therefore, to be held to embrace every case within the mischief, if also fairly within the words<sup>67</sup> read with such corrections as the court may make to avoid insensibility.<sup>68</sup> To illustrate :] under the Statute which makes it a misdemeanor knowingly to utter counterfeit coin is included a genuine coin from which the milling has been filed and replaced by another (*a*). Although the Act which punishes a man for running away from his wife and “children,” thereby leaving them chargeable to the parish, applies only to the desertion of legitimate children, this rests, not on any indisposition to depart from the strict and narrow meaning of the word, but on the ground that the object of the Legislature was limited to the enforcement of the man’s legal obligation, which did not extend to the support of his illegitimate children (*b*). But the statute which made it a criminal offence to take an unmarried girl from the possession and against the will of her father or mother, was held to apply to the case of a natural daughter taken from her putative father (*c*) ; for the wider construction obviously carried out more fully the aim and policy of the enactment. The “taking from the possession,” again, in the same enactment, is construed in the widest sense, implying neither actual nor constructive force, and extending to voluntary and temporary elopements made with the active concurrence of the girl (*d*). The “breaking” required to constitute burglary includes acts which would not be so designed in popular language ; such as lifting the flap of a cellar (*e*), or pulling down the sash of a window (*f*), or raising

<sup>66</sup> *Com’t h v. Loring*, 8 Pick. (Mass.) 370, 373.

<sup>67</sup> *Huffman v. State*, 29 Ala. 40.

<sup>68</sup> See *Turner v. State*, 40 Ala. 21 ; *U. S. v. Stern*, 5 Blatchf. 512 ; ante, § 299.

(*a*) *R. v. Hermann*, 4 Q. B. D. 284.

(*b*) *R. v. Maude*, 2 Dowl. N. S. 58 ; *Westminster v. Gerrard*, 2 Bulst. 346.

(*c*) 4 & 5 Ph. & M. c. 8, 24 & 25 Vict. c. 100, s. 55 ; *R. v. Cornforth*,

2 Stra. 1162 ; and see *R. v. Hodnett*, 1 T. R. 96.

(*d*) *R. v. Robins*, 1 C. & K. 456 ; *R. v. Kipps*, 4 Cox, 167 ; *R. v. Biswell*, 2 Cox, 279 ; *R. v. Manktelow*, Dears. 159, 22 L. J. M. C. 115 ; *R. v. Timmins*, Bell, 276, 30 L. J. M. C. 45.

(*e*) *Brown’s Case*, 2 East, P. C. 417 ; *R. v. Russell*, 1 Moo. C. C. 377. *Comp. R. v. Lawrence*, 4 C. & P. 231.

(*f*) *R. v. Haines*, R. 2 Moo. 451.

a latch (*a*), or even descending a chimney, for that is as much closed as the nature of things permits (*b*). A threatening letter is "sent" when it is dropped in the way of the person for whom it is destined, so that he may pick it up (*c*); or is affixed in some place where he would be likely to see it (*d*); or is placed on a public road near his house, so that it may, however indirectly, reach him, which it eventually does after passing through several hands (*e*); although in none of these cases would the paper be popularly said to have been "sent." To make false signals, and thereby to bring a train to a stand on a railway, was held to be within the enactment which made it an offence to "obstruct" a railway (*f*); and an enactment which makes it a misdemeanor to do anything to obstruct an engine or carriage using a railway, was held to include railways not yet open to public traffic, and to apply, though no engine or carriage was obstructed (*g*). A person "suffers" gaming to go on in his house who purposely abstains from ascertaining, or purposely goes out of reach of seeing or hearing it (*h*). An Act which made it penal to "administer" or "to cause to be taken," a noxious drug, to procure abortion, would be violated by one who supplied such a drug to a woman, and explained to her how it was to be taken, and she afterwards took it accordingly, in his absence (*i*). And a man supplies such a drug, "knowing it to be intended" to procure abortion, if he so intended it, though the woman did not (*j*).

(*a*) *R. v. Jordan*, 7 C. P. 432.

(*b*) 1 Hawk. c. 38, s. 4; *R. v. Brice*, R. & R. 450. [*Donohoo v. State*, 36 Ala. 281.] Lord Hale, who doubted whether the latter act was a breaking, was relieved from deciding the point in the case before him, as it was elicited that some bricks had been loosened in the thief's descent, which sufficed to constitute a breaking: 1 Hale, 552. Indeed, the burglar "breaks" into a house if he gets admittance by inducing the inmate to open the door by a trick, as by a pretence of business, or by raising an alarm of fire: 2 East, P. C. 485. [See, however, *State v. Henry*, 9 Ired. L. (N. C.) 463.]

(*c*) *R. v. Jepson*, and *R. v. Lloyd*, 2 East, P. C. 1115, 1123; *R. v. Wagstaff*, R. & R. 398.

(*d*) *R. v. Williams*, 1 Cox, 16.

(*e*) *R. v. Grimwade*, 1 Den. 30; and see *R. v. Jones*, 1 Cox, 67; 5 Cox, 226.

(*f*) *R. v. Hadfield*, L. R. 1 C. C. 253; *R. v. Hardy*, Id. 278; comp. *Walker v. Horner*, 1 Q. B. D. 4.

(*g*) *R. v. Bradford*, Beil, 268. [*Comp. Lee v. Barkhamsted*, 46 Conn. 213, ante, § 73.]

(*h*) *Redgate v. Haynes*, 1 Q. B. D. 89.

(*i*) *R. v. Wilson*, D. & B. 127, 26 L. J. M. C. 16; *R. v. Farrow*, D. & B. 164.

(*j*) *R. v. Hillman*, L. & C. 343.



An Act which prohibited under a penalty "the copying of a painting" without the owner's leave was held to reach a photograph of an engraving which the proprietor of the painting had made from it (*a*). The adulteration Act, 1875, which makes it penal to sell an adulterated article "to the prejudice of the purchaser," would include a sale to an officer who makes the purchase, not with his own money or for his own use, but with the public money and for the purpose of analysis (*b*). A man who fires from a highway at game, has trespassed on the land of the owner of the soil on which the highway runs; for the right of way over the road is only an easement, and if a man uses it for an unlawful purpose, he becomes a trespasser (*c*). If he walks with a gun with intent to kill game, he "uses" the gun for that purpose without firing, within the statute which makes using a gun with that intent penal (*d*); and the offence of "taking" game is complete when the game is snared, though neither killed nor removed (*e*).

§ 338. The Corrupt Practices Prevention Act of 1854 which declares that whoever, "directly or indirectly," makes a gift to a person to induce him to "endeavor to procure the return" of any person to Parliament shall be deemed guilty of bribery, was held to extend to a gift made to induce its recipient to vote for the giver at a preliminary test ballot, held for the purpose of selecting one of three candidates to be proposed when the election came. In voting for the giver at the test ballot, the voter indirectly "endeavored to procure" his return at the election (*f*). An enactment which prohibited any officer concerned in the administration of the poor laws from "supplying for his own profit" any goods "ordered" to be "given" in parochial relief to any person, was held to reach a guardian

33 L. J. M. C. 60; comp. R. v. Fretwell, L. & C. 161, 31 L. J. M. C. 145.

(*a*) Exp. Beal, L. R. 3 Q. B. 387.

(*b*) Hoyle v. Hickman, 4 Q. B. D. 233, 48 L. J. M. C. 97.

(*c*) Mayhew v. Wardley, 14 C. B. N. S. 550; R. v. Pratt, 4 E. & B. 860.

(*d*) 5 Anne, c. 14, s. 4; 1 & 2 Wm. 4, c. 32, s. 23; R. v. King, 1 Sess. Ca. 88; see, also, U. S. v. Morris, 14 Peters, 464.

(*e*) 5 Geo. 3, c. 14; R. v. Glover, R. & R. 269.

(*f*) Britt v. Robinson, L. R. 5 C. P. 503. [Comp. ante, § 335, Com'th v. Wells, 110 Pa. St. 463.]

whose partner had, with knowledge of the facts, sold a bedstead to the relieving officer on behalf of the parish for delivery to a pauper; although the guardian was ignorant of the transaction, the bedstead had not been "ordered" by the guardians (*a*), and it was only lent, not "given" in parochial relief (*b*). In another, the occupier of an enclosed ground, who admitted the public on it, on payment, to witness a foot-race and a pigeon-match, was held liable to conviction for having used the place for the purposes of betting, as a number of professional betting men had obtained entrance and carried on their business there with his knowledge; though this was not the immediate purpose for which he had thrown the grounds open, and it did not appear that he and the betting men were in any way connected in their business, or that he derived any profit from it (*c*). The Highway Act of Will. 4, which enacted that if any person (1) riding a horse, or (2) driving a carriage, rode or drove furiously, "every person so offending" should be liable on conviction before a magistrate to forfeit five pounds, if "the driver" was not the owner of the carriage, and ten pounds if "the driver" was the owner (not mentioning the rider), was construed as making the rider, who was not the owner of the horse, as well as the driver, liable; as providing, in other words, that while the owner of a carriage was liable to a penalty of ten pounds, the offender in all the other cases mentioned was liable to five pounds (*d*). An Act which punished the obtaining a "valuable security" by false pretences would include a railway ticket, which is evidence of a right of being carried on the railway (*e*).

(*a*) *Greenhow v. Parker*, 6 H. & M. 882, 31 L. J. Ex. 4. See *Woolley v. Kay*, 1 H. & N. 307, 25 L. J. Ex. 351.

(*b*) *Davies v. Harvey*, L. R. 9 Q. B. 433; *Stanley v. Dodd*, 1 D. & R. 184. *Comp. Proctor v. Manwaring*, 3 B. & A. 145.

(*c*) *Eastwood v. Miller*, L. R. 9 Q. B. 440; *Haigh v. Sheffield*, L. R. 10 Q. B. 102.

(*d*) *Williams v. Evans*, 1 Ex. D. 277, overruling *R. v. Bacon*, 11 Cox. 540.

(*e*) *R. v. Boulton*, 1 Den. 508, 19

L. J. M. C. 67; *R. v. Beecham*, 5 Cox, 181. See *Marks v. Benjamin*, 5 M. & W. 565. But one which punished an agent who in violation of good faith, and contrary to the purpose of his trust, sold, negotiated, transferred, pledged, or in any manner converted to his own use "any chattel or valuable security" with which he was intrusted, would not include a policy of insurance intrusted to him for collection; for it is neither a chattel capable of sale or barter, nor yet a valuable security, for this implies

§ 339. The tendency of modern decisions, upon the whole, is to narrow materially the difference between what is called a strict and a beneficial construction. All statutes are now construed with a more strict regard to the language, and criminal statutes, with a more rational regard to the aim and intention of the Legislature, than formerly.<sup>99</sup> It is unquestionably right that the distinction should not be altogether erased from the judicial mind (*a*); for it is required by the spirit of our free institutions that the interpretation of all statutes should be favorable to personal liberty (*b*); and it is still preserved in a certain reluctance to supply the defects of language, or to eke out the meaning of an obscure passage by strained or doubtful inferences (*c*). The effect of the rule of strict construction might almost be summed up in the remark, that where an equivocal word or ambiguous sentence leaves a reasonable doubt of its meaning which the canons of interpretation fail to solve, the benefit of the doubt should be given to the subject, and against the Legislature which has failed to explain itself (*d*). But it yields to the paramount rule that every statute is to be expounded according to the intent of them that made it (*e*); and that all cases within the mischiefs aimed at are to be held to fall within its remedial influence (*f*).

§ 340. **Acts Encroaching on Rights.**—Statutes which encroach on the rights of the subject, whether as regards person or

that money is payable irrespectively of any contingency; and it is not capable of being sold, negotiated, transferred, or pledged: 24 & 25 Vict. c. 96, s. 75, R. v. Tatlock, 2 Q. B. D. 157.

<sup>99</sup> The rule requiring strict construction of penal statutes, is said not to be in force in Kentucky: *Com'th v. Davis*, 12 Bush (Ky.) 240; and, in California, to be abolished by the Penal Code: *People v. Soto*, 49 Cal. 69.

(*a*) *Per Pollock, C. B.*, in *Nicholson v. Fields*, 33 L. J. Ex. 235, 7 H. & N. 817.

(*b*) *Per Lord Abinger* in *Henderson v. Sherborne*, 2 M. & W. 239.

(*c*) *Per Story, J.*, in the *Industry*, 1 Gall. 117.

(*d*) See *Hull Dock Co. v. Browne*, 3 B. & Ad. 59; *per Pollock* in *Nicholson v. Fields*, *ubi sup.*; and *per Bramwell, B.*, in *Foley v. Fletcher*, 28 L. J. Ex. 106, 3 H. & N. 769; *Puff. L. N. b. 5, c. 12, s. 5*, *Barb. n. 4*; *Lewis v. Carr*, 1 Ex. D. 484.

(*e*) 4 Inst. §30, *The Sussex Peerage*, 11 Cl. & F. 143; 2 Peters, 662.

(*f*) *Fennell v. Ridler*, 5 B. & C. 409; *The Industry*, *ubi sup.* See *ex. gr. v. Charretie*, 13 Q. B. 447; *Wynne v. Middleton*, 1 Wils. 126; *Archer v. James*, 2 B. & S. 61, 31 L. J. 153; *Smith v. Walton*, 3 C. P. D. 109, 47 L. J. M. C. 45; *May v. G. W. R. Co.*, L. R. 7 Q. B. 384, *per Cockburn, C. J.*

property, are similarly subject to a strict construction. It is presumed that the Legislature does not desire to confiscate the property, or to encroach upon the rights of persons; and it is therefore expected that if such be its intention, it will manifest it plainly, if not in express words, at least by clear implication, and beyond reasonable doubt (*a*). The Act 21 Edw. 1, *de malefactoribus in parcis*, which authorized a parker to kill trespassers whom he found in his park, and who refused to yield to him, was construed as strictly limited to a legal park, that is, one established by prescription or Royal Charter, and not merely one by reputation (*b*). [So, an act which forbade and punished discrimination on account of color or race in any public place of amusement, was construed to refer only to licensed places of amusement, partly, at least, upon the ground that it could not be supposed, in the absence of any express provision, that the Legislature meant to limit the manner in which a person should use, or permit others to use, his own premises, unless he carried on a business or occupation therein which required a license from the Government, in order to be lawful.<sup>79</sup>] A local harbor Act, which imposed a penalty on "any person," who placed articles "on any quay, wharf, or landing place, within ten feet of the quay, head, or on any space of ground immediately adjoining the said haven, within ten feet from high-water mark," so as to obstruct the free passage over it, was held to apply only to ground over which there was already a public right of way, but not to private property not subject to any such right, and in the occupation of the person who placed the obstruction on it (*c*). Notwithstanding the comprehensive nature of the gen-

(*a*) See *per* Bramwell, L. J., in *Wells v. London & Tilbury R. Co.*, 5 Ch. D. 130; *per* Mellish, L. J., in *Re Lundy Co.*, L. R. 6 Ch. 467; *per* James, L. J., in *Exp. Jones*, L. R. 10 Ch. 665; *per cur.* in *Randolph v. Milman*, L. R. 4 C. P. 113; *Green v. R.*, 1 App. 513; *Exp. Sheil*, 4 Ch. D. 789.

(*b*) 1 Hale, 491; 3 Dyer, 326 b. Com. Dig. Parl. R. 20.

<sup>79</sup> Com'th v. Sylvester, 13 Allen (Mass.) 247. A similar considera-

tion would justify the interpretation of a statute forbidding wagers upon the results of elections, as referring *prima facie* only to elections for public officers ordered by the Legislature, and not to primary elections: see *ante*, § 335.

(*c*) *Harrod v. Worship*, 1 B. & S. 381, 30 L. J. M. C. 165; *diss.* Wightman, J. See, also, *Wells v. London & Tilbury R. Co.*, 5 Ch. D. 126; *Yarmouth v. Simmons*, 10 Ch. D. 518.

eral terms used, it was not to be inferred that the Legislature contemplated such an interference with the rights of property as would have resulted from construing the words as creating a right of way. The Partnership Law Amendment Act of 1865, which provides that when a loan to a trader bore interest varying with the profits of the trade, the lender shall not, if the trader becomes bankrupt, "recover" his principal until the claims of the other creditors are satisfied, did not deprive the creditor of any rights acquired by mortgage. Though he could not recover, he was entitled to retain (a).

§ 341. **Common Law Rights of Persons and Property.**—[The presumption against an intention to change the existing law," and against an intention to encroach upon the personal and property rights of individuals would seem to afford the rational basis and limitation of the rule requiring a strict construction of statutes which are in derogation of the common law, so far as that rule has any legitimate force or application."<sup>71</sup> Whatever rights the individual member of a society recognizing the common law possesses, are secured to him either by virtue of express grant, or by that more nearly natural right whose principles are embodied in the common law. So far as the former is concerned, the rule applies that enactments should not be construed so as to interfere with rights previously granted by the Legislature, if susceptible of a fair construction consistent with such rights."<sup>72</sup> The rights a man has by common law stand at least upon as high a plane of sanctity, and the same rule must govern the construction of statutes as regards an intention to encroach upon them. Thus, concerning personal rights, it is well settled, that a strict construction is to be given to any statute excluding a citizen from giving evidence ;<sup>73</sup> requiring a "suitor's test oath" from him, in order to entitle him to become a plaintiff in a court of justice ;<sup>74</sup> disabling, for any

(a) *Exp. Sheil*, 4 Ch. D. 789.

<sup>71</sup> See ante, §§ 113 et seqq.

<sup>72</sup> Comp. ante, §§ 128, 129, and post, § 348.

<sup>73</sup> *McAfee v. R. R. Co.*, 36 Miss. 669.

<sup>74</sup> *Pelham v. Messenger*, 16 La. An. 99.

<sup>75</sup> *Harrison v. Leach*, 4 W. Va. 383 (requiring certainty to a certain intent in every particular). Comp. *Harrison v. Smith*, Id. 97 (where

cause, a person of full age and sound mind to make contracts;<sup>76</sup> prohibiting certain county officers from purchasing, on behalf of any but the county, any tax certificates, etc., held by the county, and declaring void a deed issued in violation of the act;<sup>77</sup> or prohibiting attorneys from buying any bond, etc., with the purpose of suing thereon.<sup>78</sup>

§ 342. [And again, as concerns property rights, the same rule of construction has been applied to statutes regulating<sup>79</sup> or restraining trade or the alienation of property,<sup>80</sup> or prescribing the manner in which a man shall use his own property, or build on his own land;<sup>81</sup> or an act giving the port-wardens the exclusive right to survey vessels unfit to go to sea, and decide upon the repairs necessary.<sup>82</sup> So, an act forbidding preferences in assignments for the benefit of creditors was construed as avoiding only preferences attempted to be given in the instrument of assignment, not preferences by any mode outside of it, as by judgment, or transfer of property, mortgage, or the like;<sup>83</sup> and an act forbidding bequests to charities within one month of the testator's death, was held not to affect a fully executed and completed gift of personalty made within one month of the donor's

it was held that the oath by one co-plaintiff was sufficient to qualify all); *Pendleton v. Barton*, Id. 496 (deciding that the party insisting on the act must first take the oath).

<sup>76</sup> *Smith v. Spooner*, 3 Pick. (Mass.) 229.

<sup>77</sup> *Coleman v. Hart*, 37 Wis. 180; so that such an act ought not to be construed as prohibiting such officers from buying such certificates from another than the county, and having a deed issued thereon.

<sup>78</sup> *Ramsey v. Gould*, 57 Barb. (N. Y.) 398. But it is said that statutes imposing disabilities for purposes of protection, *e. g.*, in the case of Indians, are not subject to the rule of strict construction where such would defeat the object of the Legislature: *Doe v. Avaline*, 8 Ind. 6. Hence, one will be deemed as within the protection of such a statute who is recognized as an Indian by the community, by the Indians them-

selves, by state and federal authorities, and stamped as such by birth, education, and language, although he have but 3-8 Indian blood: *Ibid*. The same principle of liberal construction is, in that case, said to be applied to acts conditionally, prohibiting purchases from Indians, *cit. Jackson v. Ingraham*, 4 Johns. (N. Y.) 163; *Jackson v. Waters*, 12 Id. 365; *Goodell v. Jackson*, 20 Id. 693; *De Armas v. Major*, 5 Mill (La.) 182; *Baltimore v. McKim*, 3 Bland (Md.) 455.

<sup>79</sup> *Mayor v. Davis*, 6 Watts & S. (Pa.) 269.

<sup>80</sup> *Richardson v. Enswiler*, 14 La. An. 658; *Sewall v. Jones*, 9 Pick. (Mass.) 412.

<sup>81</sup> *Morris v. Balderston*, 2 Brewst. (Pa.) 459; *Stiel v. Sunderland*, 6 H. & N. 796.

<sup>82</sup> *Portwardens v. Cartwright*, 4 Sandf. (N. Y.) 236.

<sup>83</sup> *York Co. B'k v. Carter*, 38 Pa. St. 446, and see *Wiener v. Davis*, 18 Id. 331; also *ante*, §§ 144, 145.

death.<sup>84</sup> Nor was an act prohibiting the reservation of ground-rents, not perpetual in their inception, but to become so upon the vendee's failure to comply with a covenant or condition in the deed, deemed applicable to a deed which reserved a perpetual ground-rent, with an option of payment within a certain time by the vendee.<sup>85</sup>

§ 343. [A fortiori must the rule apply to statutes permitting the taking of the property of individuals for public purposes;<sup>86</sup> as by way of condemnation of private land for such a purpose,<sup>87</sup> *e. g.*, for the purpose of opening streets, etc.;<sup>88</sup> of impressment of property, *e. g.*, in the case of pestilence,<sup>89</sup> or war,<sup>90</sup>—short, however, always, of defeating the object of the enactment.<sup>91</sup> The same principle brings within the rule of strict construction statutes authorizing the sale of land for non-payment of taxes;<sup>92</sup> and acts working forfeitures and confiscations of the property of individuals;<sup>93</sup> so that, whilst full effect is to be given to the expression of the legislative will<sup>94</sup> they must not be held intended to defeat the rights of third parties in the property, adverse to the individual, but only to operate upon the individual himself.<sup>95</sup> More particularly is this strictness required where an act subjects one man's property to seizure for the liability of another.<sup>96</sup> Similarly within the rule is an act discharging securities from their obligation upon refusal of the creditor, after notification, to sue the principal.<sup>97</sup> And] upon this

<sup>84</sup> *McGlade's App.*, 99 Pa. St. 338.

<sup>85</sup> *Palairer v. Snyder*, 106 Pa. St. 227.

<sup>86</sup> *Sharp v. Speier*, 4 Hill (N. Y.) 176.

<sup>87</sup> *Gilmer v. Lime Point*, 19 Cal. 47; *Curran v. Shattuck*, 24 Id. 427.

<sup>88</sup> *Roffignac Str.*, 7 La. An. 76. So that an act authorizing a municipality to open and widen streets according to a procedure therein prescribed, and then prescribing no procedure for the latter cases, *i. e.*, widening streets, remains inoperative to that extent: *Chaffer's App.*, 56 Mich. 244.

<sup>89</sup> *Pinkham v. Dorothy*, 55 Me. 135.

<sup>90</sup> *White v. Ivey*, 34 Ga. 186.

<sup>91</sup> *N. Y.*, etc., *R. R. Co. v. Kip*, 46 N. Y. 546.

<sup>92</sup> *Young v. Martin*, 2 Yeates (Pa.) 312; *Wills v. Auch*, 8 La. An. 19; *Sibley v. Smith*, 2 Mich. 486, where under this rule of construction, it was held that the Auditor General cannot convey lands sold for taxes, in the absence of a special authority to do so given by the statute.

<sup>93</sup> *U. S. v. Athens Armory*, 35 Ga. 344; *Russell v. University*, 1 Wheat. 432.

<sup>94</sup> *U. S. v. Athens Armory*, *supra*.

<sup>95</sup> *Russell v. University*, *supra*.

<sup>96</sup> *Stb. Ohio v. Stunt*, 10 Ohio St. 582.

<sup>97</sup> *Miller v. Childress*, 2 Humph. (Tenn.) 320.

ground, it would seem, Statutes of Limitation are to be construed strictly. There may not necessarily be any moral wrong in setting up the defence of lapse of time, but it is the creature of positive law, and is not to be extended to cases which are not strictly within the enactment, [and therefore not to be extended to cases not within their words, though possibly within their reason,<sup>98</sup> nor to be construed most prejudicially to the right they limit;<sup>99</sup>] while provisions which give exceptions to the operation of such enactments are to be construed liberally (*a*). [Although such statutes, being founded on sound policy, so far as they are statutes of repose, are not to be evaded by construction,<sup>100</sup> and consequently, though in terms applicable only to actions, apply to all claims that may be the subject of actions, however presented, falling within their intended operation,<sup>101</sup> yet they cannot be made to apply to a cause of action not embraced within their intention by presenting it in a form of action to which, in terms it is made applicable, the nature of the cause of action, not the form, determining the applicability of the statutes.<sup>102</sup>

§ 344. **Summary Proceedings.**—[To the presumption against an intention to affect common law rights, both of property and persons, the rule requiring strict construction of statutes authorizing summary proceedings seems, at least in part, properly referable.<sup>103</sup> To this class of statutes belong those authorizing attachments,<sup>104</sup> so as to require strict compliance with the act, in all its details, concerning the bond to be

<sup>98</sup> *Bedell v. Janney*, 9 Ill. 193; *Garland v. Scott*, 15 La. An. 148; and see *Delaware, etc., R. R. Co., v. Burson*, 61 Pa. St. 369.

<sup>99</sup> *Elder v. Bradley*, 2 Sneed (Tenn.) 247.

(*a*) See the Judgment of Lord Cranworth in *Roddam v. Morley*, 1 DeG. & J. 1, 26 L. J. Ch. 438. [Comp. § 350, note.]

<sup>100</sup> *Roberts v. Pillow, Hempst.* 624; *McCarthy v. White*, 21 Cal. 495; *Phillips v. Pope*, 10 B. Mon. (Ky.) 163; *Dickenson v. McCarny*, 5 Ga. 486.

<sup>101</sup> *Hart's App.*, 32 Conn. 520.

<sup>102</sup> *DeHaven v. Bartholomew*, 57 Pa. St. 126.

<sup>103</sup> Comp. ante, §§ 158, 262.

<sup>104</sup> *Wilkie v. Jones*, 1 Morr. (Ia.) 971; *Musgrave v. Brady*, Id. 456. In *Steamboat Ohio v. Stunt*, 10 Ohio St. 582, it was said that statutes providing for the collection of claims by a summary proceeding against property by its seizure or attachment must be construed as simply providing a remedy for the enforcement of liabilities, not as creating new liabilities upon the owner of property, not arising at common law.



given before the attachment can issue,<sup>106</sup> and the like ; sales by a constable on a landlord's warrant,<sup>107</sup> or an arrest without direct charge of guilt;<sup>107</sup> or the entry of judgment against a defendant, without trial by jury, for want of an affidavit of defence;<sup>108</sup> or the entry of judgment, without any proceedings affording the defendant a hearing, on premium notes given to an insurance company, in which he is a policyholder.<sup>109</sup> So, under an act authorizing the court of common pleas to mark judgments satisfied on proof of payment, it was held that it was necessary, in order to warrant the exercise of this jurisdiction, to show actual payment in full, an allegation of set-off to the full amount of the judgment remaining unpaid not being sufficient;<sup>110</sup> and that a mechanics' lien did not at all fall under the operation of its provisions.<sup>111</sup> Again, where an act provided, that, in all cases of leases or verbal letting of property for a term of years, or from year to year, in which the landlord had lost the lease or evidence of the beginning and conclusion of the term, and could not produce proof of the same, he might give the tenant notice, in writing, to furnish him, within thirty days, with the date at which his term of tenancy began, and upon refusal of the tenant to do so, might, at the expiration of thirty days, give the tenant three months' notice to quit, and thereafter proceed summarily before a justice to have him ejected ; it was held that the act must be strictly construed and confined to the precise case contemplated by the act,—that the inquisition of the magistrate must exhibit, and, of course, proof be laid before him of, every fact which the act made necessary to the jurisdiction,—that the act applied only in cases of tenancies created by lease which fixed a term and rent,—that it must appear that there was a tenancy for years or from year to year,—and that the first year of the term, or the term itself, was ended.<sup>112</sup> And similarly, it was held that a distress

<sup>106</sup> Blake v. Sherman, 12 Minn. 420.

<sup>107</sup> Murphy v. Chase, 103 Pa. St. 260.

<sup>107</sup> State v. Dale, 3 Wis. 795.

<sup>108</sup> Wall v. Dovey, 60 Pa. St. 213.

<sup>109</sup> Barker v. Beeber, 112 Pa. St. 216.

<sup>110</sup> Riddle's App., 104 Pa. St. 171.

<sup>111</sup> State v. McCullough, 107 Pa. St. 39.

<sup>112</sup> McCullen v. McCreary, 54 Pa. St. 230. See, also, Logwood v. Huntsville, Minor (Ala.) 23 ; Hale v. Burton, Dudley (Ga.) 105. Comp. Lynde v. Noble, 20 Johns.

warrant which the auditor was authorized by statute to issue for the collection of a balance found due on the settlement of a revenue collector's accounts, being a special and summary jurisdiction, could only be issued with promptness and in strict conformity with the statute."<sup>113</sup>]

§ 345. **Acts Imposing Burdens.**—Statutes [which require gratuitous services of any class of citizens,<sup>114</sup> or] which impose pecuniary burdens, also, are subject to the rule of strict construction. It is a well settled rule of law that all charges upon the subject must be imposed by clear and unambiguous language, because in some degree they operate as penalties (a). The subject is not to be taxed unless the language of the statute clearly imposes the obligation (b); [for taxes are not imposed by implication."<sup>115</sup>] In a case of doubt the construction most beneficial to the subject is to be adopted (c). Thus, it was held that an Act which imposed a stamp on every writing given on the payment of money, "whereby any sum, debt, or demand" was "acknowledged to have been paid, settled, balanced, or otherwise discharged," was held not to extend to a receipt given on the occasion of a sum being deposited (d). If one instrument be incorporated by reference in another, its words would not be counted as a part of the incorporating deed for the purpose of stamp duty, under an Act imposing a duty according to its length on the instrument, "together with every schedule, receipt, or other matter put or endorsed thereon, or annexed thereto" (e). Where an Act imposed a stamp duty on newspapers, and defined a newspaper as comprising "any paper containing public news, intelligence, or occur-

(N. Y.) 80, 82; *Smith v. Moffat*, 1 Barb. (N. Y.) 65.

<sup>113</sup> *Haley v. Petty*, 42 Ark. 392.

<sup>114</sup> *Webb v. Baird*, 6 Ind. 13.

(a) *Per Bayley, J.*, in *Denn v. Diamond*, 4 B. & C. 243; *per Park, J.*, in *Doe v. Snaith*, 8 Bing. 152; *Partington v. Atty.-Genl.* L. R. 4 II. L. 100; *Iles v. West Ham Union*, 8 Q. B. D. 69.

(b) *Per Cur.* in *Hull Dock Co. v. Browne*, 2 B. & Ad. 59; *per Pollock, C. B.*, in *Nicholson v. Fields*, 81 L. J. Ex. 223; *Parry v. Croyden*

*Gas Co.*, 11 C. B. N. S. 579; 15 Id. 568.

<sup>115</sup> *Poor Dir's v. School Dir's*, 42 Pa. St. 21, 25.

(c) *Per Lord Lyndhurst* in *Stockton R. Co. v. Barrett*, 11 Cl. & F. 602; *per Parke, B.*, in *Re Micklewaite*, 11 Ex. 456, 25 L. J. 19.

(d) *Tomkins v. Ashby*, 6 B. & C. 541. See also *Wroughton v. Turtle*, 11 M. & W. 561.

(e) *Fishmonger's Co. v. Dimsdale*, 13 C. B. 557; 22 L. J. C. P. 44.

rences . . . to be dispersed and made public, and also "any paper containing any public news, intelligence, or occurrences, or any remarks or observations thereon . . . published periodically or in parts or numbers, at intervals not exceeding twenty-six days," and not exceeding a certain size; it was held that a publication, the main object of which was to give news, but which was published at intervals of more than twenty-six days, was not liable to the stamp duty as a newspaper (*a*). An Act which imposes a stamp duty on "every charter party, or memorandum, or other writing between the captain or owner of a vessel and any other person, relating to the freight or conveyance of goods on board," does not extend to a guarantee for the due performance of a charter party (*b*). And yet, where an Act, after imposing a stamp on contracts, exempted those which were made relative to the sale of goods, a guarantee for the payment of the price on such a sale was held included in the exemption (*c*); the same words being susceptible of meaning different things when used to impose a tax, or to exonerate from it (*d*). Lord Ellenborough remarked that the cases to which a duty attached ought to be fairly marked out, and that a liberal construction ought to be given to words of exception confining the operation of the duty (*c*); [whilst the taxing provisions are to be construed most strongly against the Government, and in favor of the person subjected to the imposition, and not to be extended by implication beyond the clear import of the language used.<sup>116</sup> The exercise of the taxing power by the Legislature being strictly construed, it would follow, as a matter of course, that a delegation of

(*a*) *Atty.-Genl. v. Bradbury*, 7 Ex. 97, 21 L. J. 12.

(*b*) 5 & 6 Vict. c. 79; *Rein v. Lane*, L. R. 2 Q. B. 144.

(*c*) *Warrington v. Furber*, 8 East, 242.

(*d*) *Per Blackburn, J.*, L. R. 2 Q. B. 151, citing *Curry v. Edensor*, 8 T. R. 527, and *Warrington v. Furber*, *ubi sup.* See, also, *Armitage v. Williamson*, 3 App. 355.

<sup>116</sup> *U. S. v. Wigglesworth*, 2 Story, 369. Compare, however, *Cornwall v. Todd*, 38 Conn. 443, and *Bish.*,

*Wr. L.*, § 195. And see *City of Titusville's App.*, 108 Pa. St. 600, where, under an act making taxes liens on real estate and giving them priority over mortgages thereon, and also directing an addition of a certain percentage to the taxes, for non-payment before a certain day, it was held that this penalty becomes part of the tax, and is entitled to the same priority with it. See *ante*, § 331, *Com'th v. Stand. Oil Co.*, 101 Pa. St. 119.

that power to an inferior branch of the government, *e. g.*, a municipality, must be in clear and unequivocal terms."<sup>117</sup>]

§ 346. At the same time, Acts imposing such burdens, like penal Acts, are not to be so construed as to furnish a chance of escape and a means of evasion (*a*). Indeed, as in criminal statutes, the widest meaning is given to the language when needful to effectuate the intention of the Legislature. For instance, in one of the Church Building Acts, which enacted that the "repairs" of district churches might be provided for by a rate on the district, the word "repairs" was construed as comprising not only reparation of the structure but all incidental matters necessary for the due performance of service, such as lighting, cleaning, stationery, and organist's salary (*b*). In America, revenue laws are not regarded as penal laws in the sense that requires them to be construed with strictness in favor of the defendant. They are regarded rather in their remedial character; as intended to prevent fraud, suppress public wrong and promote the public good; and are so construed as most effectually to accomplish those objects (*c*); [and this, though they impose penalties and forfeitures for their violation and frauds committed against them.<sup>118</sup> Indeed, it has been held, that such statutes are to be liberally construed, so as to bring under their operation as well that which is within their meaning as that which is within their letter.<sup>119</sup> But, on the other hand, it is said that revenue and duty acts are to be classed neither as remedial nor as penal, but are to be construed according to their true meaning and import;<sup>120</sup> that they are not to be extended beyond the clear import of the words

<sup>117</sup> See post, §§ 352 et. seq.

(*a*) *U. S. v. Thirty-six barrels of wine*, 7 Blatchf. 459.

(*b*) *R. v. Consistory Court*, 2 B. & S. 339, 31 L. J. Q. B. 106. See *R. v. Warwick*, 8 Q. B. 926, sup. § 103.

(*c*) *Cliquot's Champagne*, 3 Wallace, 145. [See, to same effect: *Taylor v. U. S.*, 3 How. 197; *U. S. v. Barrels of Spirits*, 2 Abb. U. S. 305; *U. S. v. Willetts*, 5 Ben. 219; *U. S. v. Barrels of High Wines*, 7 Blatchf. 459; *U. S. v. Three Tons*

of Coal, 6 Biss. 379; *U. S. v. Olney*, 1 Abb. U. S. 275; *Twenty-eight Cases*, 2 Ben. 63; *U. S. v. Cases of Cloths*, Crabbe 356; *U. S. v. Athens Armory*, 35 Ga. 344.]

<sup>118</sup> See cases in preceding note and infra.

<sup>119</sup> *U. S. v. Hodson*, 10 Wall 395.

<sup>120</sup> *Davy v. Morgan*, 56 Barb. (N. Y.) 218. But see *Crosby v. Brown*, 60 Id. 548, where a strict construction was applied.

used, nor their scope enlarged by legal fiction to include matters not within the same;<sup>121</sup> that, in cases of substantial ambiguity or doubtful classification, the construction should favor the importer, duties not being imposed by vague or doubtful interpretation.<sup>122</sup> And it has been decided that a law prohibiting liquor selling without license, and imposing a penalty upon its violation, should not be treated as a mere revenue law, but as a law for the prevention of offences.<sup>123</sup> The proper rule probably is, as pointed out by an eminent writer,<sup>124</sup> that, in the accomplishment of their primary object, the mere collection of duties, proportionate contributions to the public burden, these enactments are not to be construed with the rigid strictness applicable to penal laws;<sup>125</sup> but that, so far as they create crimes, they require the strict construction of such laws, and as to forfeitures and penalties recoverable in civil actions, a stringency equal to that applied to laws giving punitive damages. But it is intimated, that the tendency of later cases is to construe revenue laws, even as to such provisions, "liberally, not in the extreme sense, yet not strictly but in a sort of equipoise between the two interpretations."<sup>126</sup>]

§ 347. **Acts Allowing Costs.**—It is said that all statutes which give costs are to be construed strictly, on the ground that costs are a kind of penalty (*a*) [and mere creatures of statutes, unknown to the common law.<sup>127</sup>] There is little authority in support of the proposition. On the other hand, the power of ordering the payment of costs has been sometimes construed on the principle of beneficial and liberal construction; as where, for instance, they have been imposed

<sup>121</sup> U. S. v. Watts, 1 Bond, 580.

<sup>122</sup> Powers v. Barney, 5 Blatchf. 202.

<sup>123</sup> Campbell v. State, 46 Ala. 116; Lillenstein v. State, Id. 498; and consequently not within a general repeal of revenue laws: Ibid. See, also, Mulvey v. State, 43 Id. 316. And an inspection law was declared to be penal in Com'th v. Giltinan, 64 Pa. St. 100.

<sup>124</sup> Bish., Wr. L., § 195.

<sup>125</sup> Cit. U. S. v. Buzzo, 18 Wall,

125.

<sup>126</sup> Ibid.

(*a*) Com. v. Bowles, 1 Salk. 205; [Dent v. State, 42 Ala. 514.] See *per* Mellor, J., in Cobb v. Mid-Wales R. Co., L. R. 1 Q. B. 351. [In Powers v. Wright, 62 Miss. 35, it is said that acts giving the jury the right to find damages, actual or vindictive against the plaintiff are penal as to him.]

<sup>127</sup> Bish., Wr. L., § 195a, cit State v. Kinne, 41 N. H. 238. See *Addenda*.

on persons who were strangers to an action of ejectment, but at whose instance it was brought or defended (*a*).

§ 348. **Acts Regulating Form and Execution of Contracts.**—Enactments, also, which impose forms and solemnities on contracts on pain of invalidity, are construed strictly, so as to be as little restrictive as possible of the natural liberty of contracting. It was in allusion to the Statute of Frauds that Lord Nottingham said that all Acts which restrain the common law, that is, apparently, which impose restrictions unknown to the common law, ought themselves to be restrained in exposition (*b*). [The statutes of frauds, which in order to the validity and suableness of specified contracts, required certain memoranda, in writing, signed or subscribed by the parties, or by the party to be charged, have given rise to many decisions apparently in this spirit.<sup>128</sup>] It has been said that the cases have gone very far in putting the correspondence of parties together, to constitute a memorandum to satisfy the statute (*c*). Indeed, as it becomes necessary, in such a case, to inquire what the contract really was, in order to determine whether the informal papers constitute a written note of it, it may be said that the very evil is let in against which the statute aimed (*d*). A letter from the purchaser addressed to a third person, stating the terms of the contract (*e*), and one from the purchaser to the seller, which after setting forth its terms repudiated the contract, have been held sufficient notes or memoranda of the bargain to satisfy the statute (*f*). So, although it is

(*a*) *Hutchinson v. Greenwood*, 4 E. & B. 324; *Mobbs v. Vandenberg*, 4 B. & S. 904; 33 L. J. Q. B. 177; comp. *Evans v. Rees*, 2 Q. B. 334; *Anstey v. Edwards*, 15 C. B. 212; *Hayward v. Gifford*, 4 M. & W. 194. See, also, *R. v. Pembroke*, 3 Q. B. 901, sup. § 29.

(*b*) *Ash v. Abdy*, 3 Swanst. 664.  
<sup>128</sup> See 3 Pars. Contr., Ch. v. pp. 3-67.

(*c*) *Per Pollock, C. B.*, in *McLean v. Nicoll*, 7 Jur. N. S. 999. See, e. g., *Shortrede v. Cheek*, 1 A. & E. 57; *Boydell v. Drummond*, 11 East, 142; *Dobell v. Hutchinson*, 3 A. & E. 355; *Watts v. Ains-*

*worth*, 1 H. & C. 83, 31 L. J. Ex. 448; *Morris v. Wilson*, 5 Jur. N. S. 168; *Crane v. Powell*, L. R. 4 C. P. 123; *Bonnewell v. Jenkins*, 8 Ch. D. 70; *Commings v. Scott*, L. R. 20 Eq. 11; *Kronheim v. Johnson*, 7 Ch. D. 60, 47 L. J. 132; *Beckworth v. Talbot*, 95 U. S. 289. See *Ridgway v. Warton*, cited in *Jones v. Victoria Dock Co.*, 2 Q. B. D. 314.

(*d*) *Per Channell, B.*, *Ibid.* See ex. gr. *Rishton v. Whatmore*, 8 Ch. D. 467, 47 L. J. 629.

(*e*) *Gibson v. Holland*, L. R. 1 C. P. 1. Sugd. V. & P. 113, 13th ed.

(*f*) *Bailey v. Sweeting*, 9 C. B.

necessary that the parties to the contract should be sufficiently described to admit of their identification (*a*), it is not necessary that they should be described by name. It has been held, for instance, that a contract of sale signed by the auctioneer, as "the agent of the proprietor," or of "the trustee for the sale" of the property sold, sufficiently described the seller (*b*); though a contract similarly "signed by the agent of the vendor" would not suffice (*c*); for a mere assertion that the person who sells is the seller, is obviously not a description of the seller, nor tends to his identification.

Again, as regards the signing or subscribing an instrument as party or witness, the enactments which require these formalities have been construed with similar indulgence. The testator who wrote his will with his own hand, and began by declaring that it was his will, setting forth his name, was deemed to have thereby sufficiently "signed" his will (*d*); and an attesting witness who wrote his name on the will, elsewhere than at the end of it, was deemed to have sufficiently "subscribed" it, within the Statute of Frauds (*e*). [So, under an act requiring wills to be signed at the end thereof, it was held that this meant at the end of the obviously inherent sense, though it might not be at the end in point of space.<sup>129</sup> Hence, where a will was written on the first and third pages of a sheet of paper, and signed at the end of the third page, the body of the will containing an erasure, explained by a reference, in the words "See next page," to something more on the fourth page, it was held that this was to be read as part of the will.<sup>130</sup>] An agreement,

N. S. 843, 30 L. J. 150; *Wilkinson v. Evans*, L. R. 1 C. P. 407, dubit. *Cockburn*, C. J., in *Smith v. Hudson*, 34 L. J. Q. B. 149, 6 B. & S. 431; *Buxton v. Rust*, L. R. 7 Ex. 1, 279.

(*a*) *Charlewood v. Bedford*, 1 Atk. 495; *Champion v. Plummer*, 1 N. R. 252; *Williams v. Lake*, 2 E. & E. 349, 29 L. J. Q. B. 1.

(*b*) *Sale v. Lambert*, L. R. 18 Eq. 1; *Catling v. King*, 5 Ch. D. 660; *Roskier v. Miller*, 3 App. 1124, 48 L. J. Ch. 10.

(*c*) *Potter v. Duffield*, L. R. 18 Eq. 4; *Thomas v. Brown*, 1 Q. B. D. 714.

(*d*) 29 Car. 2, c. 3, s. 5; *Lemane v. Stanley*, 3 Lev. 1.

(*e*) *Roberts v. Phillips*, 4 E. & B. 450; 24 L. J. 171. [And see, on this subject, 1 *Jarman, Wills*, (5th Am. Ed.) Ch. vi. ; 2 *Id.*, pp. 763 et seqq.]

<sup>129</sup> *Baker's App.*, 107 Pa. St. 381.

<sup>130</sup> *Ibid.* But under a statutory requirement that a memorandum of sale shall be "subscribed," it

too, has been held to be sufficiently signed by a corporate body, within the meaning of the Statute of Frauds, where a resolution ordering its engrossment and execution was passed by the body and signed by the chairman (*a*). [And where an act directed that "all contracts on account of the state prison shall be made with the warden, and when approved by the inspectors, shall be binding in law," it was held that a contract need not be in writing; and that the approval of the inspectors might be implied from acts, and need not be given by an express vote, nor appear on the records.<sup>181</sup> The broad indulgence with which such statutes are construed in favor of the validity of instruments coming under their operation, is but the correlative, and implies a corresponding degree of strictness in the construction of their restraining provisions. Thus, where an act prescribed that the will of a married woman should be executed in the presence of two disinterested and credible witnesses, it was held that the witnesses need not be subscribing witnesses.<sup>182</sup>]

§ 349. **Acts Creating Monopolies, etc.**—Acts which establish monopolies (*b*), or confer exceptional exemptions and privileges, correlatively trenching on general rights, are subject to the same principle of strict construction (*c*).

[As to statutes creating monopolies, this is especially so, where they are in restraint of trade and against public convenience and improvement.<sup>183</sup> The rule applies to the grant of an exclusive right to build, and maintain, etc., toll bridges;<sup>184</sup> so that the provision that no "bridge" should be built within a mile of the toll-bridge provided by the charter, was held not to forbid the building of a railway viaduct;<sup>185</sup> and the

was held not enough that the signature of the party to be charged appeared in the midst of the list of articles, the subjects of the sale: *McGivern v. Flemming*, 12 Daly (N. Y.) 289. And see *Coon v. Rigden*, 4 Col. 276.

(*a*) *Jones v. Victoria Dock Co.*, 2 Q. B. D. 314. [See *Field, Priv. Corp.*, § 247.]

<sup>181</sup> *Austin v. Foster*, 9 Pick. (Mass.) 341.

<sup>182</sup> *Combs' App.*, 105 Pa. St. 155. See ante, § 20, note 93.

(*b*) *Per Lord Campbell in Read v. Ingham*, 3 E. & B. 899, 23 L. J. 156; *Direct U. S. Cable Co. v. Anglo-Am. Co.*, 2 App. 394. [*Westfall v. Mapes*, 3 Grant (Pa.) 198.]

(*c*) See ex. gr. *R. v. Hall Dock Co.*, 3 B. & C. 516, *Brunskill v. Watson*, L. R. 3 Q. B. 418.

<sup>183</sup> *Westfall v. Mapes*, supra.

<sup>184</sup> See *Bridge Co. v. R. R. Co.*, 13 N. J. Eq. 81; 1 Wall. 116; *Lake v. R. R. Co.*, 7 Nev. 294.

<sup>185</sup> Cases in preceding note. See



grant of a right to build a macadamized road and charge toll thereon, so that such a grant would not confer the latter power until all the terms of the statute were complied with and the road completed.<sup>136</sup> And where an act passed in 1867 authorized a borough to construct public water works, the building of them to be submitted and postponed to a popular vote, and an act passed in 1874, which was accepted by a private water company chartered in 1860 to supply the borough with water, provided, that, within the district or locality covered by its charter, the right of such a company incorporated under, or accepting, that act, to enjoy its franchises and privileges should be "an exclusive one," the right of the water company was held to be exclusive only as against other private water companies, not as against the borough.<sup>137</sup>

§ 350. **Acts Creating Exceptions from Recognized Liabilities, etc.**—[The same rule applies to the construction of statutes creating exceptions or exemptions from recognized liabilities.] The enactment, for instance, that ship-owners should not be liable for damage done by their ships without their default, beyond "the value of the ship" and its "freight," was held to include, in this value, everything belonging to her owners that was on board for the performance of her adventure, such as the fishing stores of a vessel employed in the Greenland fishery; although they would not have been covered by a policy on "the ship and freight," and the phrase, "the value of the ship and her appurtenances" had been used ten times in other parts of the Act (*a*). This decision rested on the ground that the enactment abridged the common law right of the injured person; and that the ship-owner was not entitled to more than the meaning of the words strictly imported. So, the enactments which exonerate a ship-owner from liability for damage caused by his ship through the default of a compulsorily employed pilot, are restricted to

similar construction of the words "bridge," "bridge structure," ante, § 79.

<sup>136</sup> *State v. Curry*, 1 Nev. 251. See, also, upon this subject, Sedgw., pp. 291-292. But compare

*Binghampton Bridge Case*, 3 Wall. 51.

<sup>137</sup> *Lehigh Water Co.'s App.*, 102 Pa. St. 515.

(*a*) *Gale v. Laurie*, 5 B. & C. 156; *Smith v. Kirby*, 1 Q. B. D. 131. "Freight:" see *Addenda*.

cases where the pilot was the sole cause of the damage, without any default on the part of the master or crew (*a*). [As belonging to this class of statutes, falling under the rule of strict construction have been recognized enactments exonerating railroad companies from liability for injury by accident to passengers riding on the platforms of cars;<sup>138</sup> exempting portions of debtors' property from liability for their debts;<sup>139</sup> staying civil process against persons enlisting in the army;<sup>140</sup> or exempting partners from individual liability for partnership debts:<sup>141</sup> so that a person claiming such exemption, *e. g.*, under a limited partnership act, must show that he has strictly complied with its requirements, and that members of a general partnership already engaged in business cannot, by recording a statement in due form, under the Pennsylvania limited partnership act of 2 June, 1874, showing that each partner has subscribed and paid in cash a sum certain, protect themselves against individual liability for the debts of the association subsequently contracted, when, as a matter of fact, no cash has been actually subscribed or paid, but the assets of the firm as originally constituted have simply been allowed to remain in the business.<sup>142</sup> To

(*a*) *The Protector*, 1 W. Rob. 45; *The Diana*, 4 Moo. P. C. 11; *The Iona*, L. R. 1 P. C. 426.

<sup>138</sup> *Willis v. R. R. Co.*, 32 Barb. (N. Y.) 398.

<sup>139</sup> *Rue v. Alter*, 5 Denio (N. Y.) 119; so as not to exempt, with a "team," its necessary fodder: *Ibid.*, and to restrict a homestead exemption in such manner as to exclude from exemption the whole of a block, the character and construction of which was for business purposes, although a part was used as a dwelling: *Re Lammer*, 7 Biss. 269. Compare, however, *Charless v. Lamberson*, 1 Iowa, 435, and ante, § 103.

<sup>140</sup> *Breitenbach v. Bush*, 44 Pa. St. 313; so as to give but one stay, to be computed from the time of original muster, and not to be renewed by re-enlistment: *Ibid.* So, disabilities saving rights of action cannot be tacked to each other, *e. g.*, infancy and coverture: see *Carlisle v. Stitler*, 1 Pen. &

W. (Pa.) 6; *Thompson v. Smith*, 7 Serg. & R. (Pa.) 209; *Rankin v. Tenbrook*, 6 Watts (Pa.) 388; *Marple v. Myers*, 12 Pa. St. 122; *Rider v. Maul*, 46 Id. 376.

<sup>141</sup> *Andrews v. Schott*, 10 Pa. St. 47; *Vandike v. Roskam*, 67 Id. 330; *Maloney v. Bruce*, 94 Id. 249; *Eliot v. Himrod*, 108 Id. 569; *Pierce v. Bryant*, 5 Allen (Mass.) 91.

<sup>142</sup> *Eliot v. Himrod*, supra, and other cases in preceding note. Conversely, statutes subjecting stockholders in corporations to individual liability for debts of the corporation, and giving remedies for the enforcement of such liability, are also to be strictly interpreted and pursued: *Moyer v. Pa. Slate Co.*, 71 Pa. St. 293; *Lane's App.*, 105 Id. 49; *O'Reilly v. Bard*, Id. 569. And see, to same effect, *Breitung v. Lindauer*, 37 Mich. 287, where, in construing an act requiring annual reports of the condition of certain corporations,

this category belongs all of that class legislation ;<sup>143</sup> so abundant of late, giving liens, preferences, and the like to certain kinds of claims,—as, *e. g.*, an act giving certain preferences in payment out of county revenues,<sup>144</sup> or the effects of a failing debtor ;<sup>145</sup> requiring bail absolute on an appeal from the judgment of a justice in favor of plaintiff for “wages of manual labor.”<sup>146</sup> Hence an act preferring claims for wages would not benefit a person who had paid and held store-orders issued on account of wages, the transfer of such not constituting an assignment of a labor claim.<sup>147</sup> Nor would a lien created by statute upon a tenant's crops, be construed, in the absence of a clear expression or fair implication to that effect to have a superiority not attached by the common law to similar charges, *e. g.*, so as to bind it in the hands of bona fide purchasers.<sup>148</sup> And a statute, local in its operation and prejudicial to owners of land will be strictly construed ;<sup>149</sup> as, *e. g.*, a special statute giving mechanics liens upon leasehold interests in certain cases and localities.<sup>150</sup>]

and making directors who “intentionally neglect” to file such reports liable for all debts of the corporation contracted during the period of such neglect, it was held (1) that the statute was not to be interpreted as though the word “intentionally” were omitted; (2) that the directors were not primarily liable under it; (3) that the liability imposed was a penalty, and not a contract obligation upon which creditors could rely, so that, if not put in judgment, it could not be enforced after a repeal of the clause imposing it, even if incurred before. *Comp. ante*, § 14.

<sup>143</sup> See *Womelsdorf v. Heifner*, 104 Pa. St. 1; *Oppenheimer v. Morrell*, (Pa.) 10 Centr. Rep. 635, 636.

<sup>144</sup> *People v. Williams*, 8 Cal. 97.

<sup>145</sup> *Chapin v. Persse, etc.*, Works, 30 Conn. 461; and see *Rheeling's App.*, 107 Pa. St. 161.

<sup>146</sup> *Womelsdorf v. Heifner*, *supra*; so that a judgment based upon a cause of action shown by the docket to be “work and labor Don on farne” would not require such bail; for the work and labor may

have been mere superintendence: *Ibid.* See *ante*, § 99, as to what constitutes a laborer under such statutes.

<sup>147</sup> *Rheeling's App.*, *supra*.

<sup>148</sup> *Scaife v. Stovall*, 67 Ala. 237.

<sup>149</sup> *Marsh v. Nelson*, 101 Pa. St. 51, in this case so as to have a retrospective operation only, and not to apply to future cases.

<sup>150</sup> *Esterly's App.*, 54 Pa. St. 192. But see *Dame's App.*, 62 Id. 417. See, also, *Hartman's App.*, 107 Id. 327, where, under an act giving certain operatives in works, etc., a preferred lien on the same in the event of their “sale or transfer . . . preceding the death or insolvency” of the employer, it was held that any sale or transfer of such works, etc., during the life-time or solvency of the employer was intended, and that the claimant need not show his subsequent death or insolvency. See *Bullock v. Horn*, 44 Ohio St. 420, holding a statute relating to mechanics' liens to be remedial and construable liberally to carry out the legislative intent.

§ 351. **Acts Creating New or Special Jurisdictions.**—The same principle of construction is applied to enactments which create new [or special] jurisdictions, or delegate subordinate legislative or other powers (*a*).

[It has already been seen<sup>151</sup> that there is a presumption against an intention to create new jurisdictions. The consequence of this presumption is a strict construction of statutes which do create them.<sup>152</sup> The same presumption and the same result hold good as to statutes giving new remedies;<sup>153</sup> *e. g.*, an act conferring a right of distress.<sup>154</sup> But they are said not to apply to statutory regulations for the exercise of a pre-existing common law right.<sup>155</sup>

[A strict compliance with the requirements of a statute is also exacted, where the same confers a special jurisdiction, as, the right to issue writs of attachment upon certain antecedent conditions,<sup>156</sup> or to remove corporate officers.<sup>157</sup>] The 22 & 23 Vict. c. 21, which empowered the Barons of the Exchequer to make rules as to the process, practice, and pleading of their Court in revenue cases, was held not to authorize them to make rules granting an appeal to the Exchequer Chamber and House of Lords (*b*). A different construction would, in effect, have given the Barons authority to confer jurisdiction on two Superior Courts, and to impose on them the duty of hearing an appeal against its decisions (*c*). A power given to the Court, subject to the restrictions of the Act, to authorize the grant of leases, followed by a proviso that any person entitled to the possession of settled estates might apply to the Court for the exercise of the power, was held not exercisable except on the

(*a*) See *ex. gr. per* James, L. J., in *Flower v. Lloyd*, 6 Ch. D. 301; *Diss v. Aldrich*, 2 Q. B. D. 179.

<sup>151</sup> Ante, §§ 155 et seq.

<sup>152</sup> *East Union Tp. v. Ryan*, 86 Pa. St. 459. See, also, *Marshall's Lessee v. Ford*, 1 Yeates (Pa.) 195; *Wistar v. Kammerer*, 2 Id. 100.

<sup>153</sup> *East Union Tp. v. Ryan*, *supra*.

<sup>154</sup> *Rutherford v. Maynes*, 97 Pa. St. 78.

<sup>155</sup> *Avery v. Groton*, 36 Conn. 304. Nor to an act creating a

right of action in an individual or a class of individuals: *Neal v. Moultrie*, 12 Ga. 104.

<sup>156</sup> *Sedgw.*, p. 301, cit. *Buckley v. Lowry*, 2 Mich. 419; *People v. Reed*, 5 Denio (N. Y.) 554. See, also, *Haley v. Petty*, 42 Ark. 392, ante, § 344.

<sup>157</sup> *Chollar Mining Co. v. Wilson*, 66 Cal. 374.

(*b*) *Atty.-Genl. v. Sillem*, 10 H. L. 705, 33 L. J. Ex. 92, 209.

(*c*) *Per* Lord Kingsdown, Id. 280, 10 H. L. 775.

application of such a person (*a*). When commissioners were authorized, at the same time that they awarded compensation, to apportion the payment among those benefited, an apportionment made at a subsequent time was held invalid (*b*). The Licensing Act, 1872, enacting that where justices have ordered a distress in default of payment of a penalty, they may order, in default of its payment, imprisonment for six months, was held not to authorize imprisonment where no order of distress had been made in consequence of the defendant admitting his inability to pay the fine. It would, indeed, have been idle to issue a distress; but the words were express and positive (*c*). So, where an Act gives an appeal to the next Quarter Sessions, that Court cannot, under a general power to regulate its procedure, reject it, unless the conviction or order appealed against be filed (*d*), or notices not required by the Statute be given (*e*), or the appeal itself be lodged, so many days before the Sessions (*f*). It might perhaps, unless the Statute required that the appeal should be decided at the same Sessions (*g*), lawfully postpone the hearing of an appeal not complying with those conditions within such time; but to reject it altogether would be to refuse the appellant the privilege given by the Act, by imposing conditions which the Legislature had not imposed. [For the same reason, where an act gives to a party the right to submit his case to arbitration, compulsory upon the opposite party, provided he announces his determination to do so before the week in which the cause is set down for trial in court, or more than thirty days before the term, the court, under a general power to prescribe rules for the regulation

(*a*) *Taylor v. Taylor*, 1 Ch. D. 426.

(*b*) *Mayor of Montreal v. Stevens*, 3 App. 605; 47 L. J. P. C. 67.

(*c*) 35 & 36 Vict. c. 94, s. 51; *Exp. Brown*, 3 Q. B. D. 545, 47 L. J. 108; *per Cockburn*, C. J., *dubit. Mellor, J.* See other illustrations, in the construction of the powers given to the railway commissioners, *Great Western R. Co. v. R. Com.*, 7 Q. B. D. 182; *Toomer v. London, Ch. & D. R.*

*Co.*, 2 Ex. D. 450; *S. E. R. Co. v. R. Com.*, 6 Q. B. D. 586.

(*d*) *R. v. West Riding*, 2 Q. B. 705.

(*e*) *R. v. West Riding*, 5 B. & Ad. 667; *R. v. Norfolk*, 5 B. & Ad. 990; *R. v. Surrey*, 6 D. & L. 735; *R. v. Blues*, 5 E. & B. 291, 24 L. J. M. C. 138.

(*f*) *R. v. Pawlett*, L. R. 8 Q. B. 491; *R. v. Staffordshire*, 4 A. & E. 844.

(*g*) *R. v. Belton*, 11 Q. B. 388.

of its practice, etc., cannot prevent the defendant from taking out a rule for arbitration before the time fixed by general rule of court for filing an affidavit of defence, or restrict his right to arbitrate upon condition of filing an affidavit, or strike off the rule to arbitrate upon his failure to do so.<sup>158</sup> And so it was held, that, the Legislature having, by statute, fixed the standard of, and the mode of keeping, petroleum, etc., it was incompetent for a board of 'health, under its general statutory powers, to impose additional restrictions.<sup>159</sup>

§ 352. **Acts Delegating Powers.**—[Powers delegated to subordinate local authorities are strictly construed, and any reasonable doubts as to the existence of a particular power resolved against the same ;<sup>160</sup> and consequently, of two possible constructions, that is to be adopted which is based on the theory that the Legislature intended to give only such powers as were necessary to carry out the objects of the enactment, and not any larger powers than were necessary for that purpose.<sup>161</sup> Hence, too, statutes delegating to municipal and other inferior authorities the power of imposing taxation must be in clear and unambiguous terms, and are subject to the rule of strict construction ;<sup>162</sup> as, *e. g.*, statutes giving municipalities power to impose a license tax on vehicles used in their streets,<sup>163</sup> or to levy assessments upon property owners for improvements to their lands.<sup>164</sup> And so, too, grants to such corporations of extraordinary powers, unknown to the common law, as that of donating corporate funds in aid of a railroad.<sup>165</sup> An act conferring special ministerial authority upon officers, in the exercise of which

<sup>158</sup> *Hickernell v. Bank*, 62 Pa. St. 146.

<sup>159</sup> *Met. B'd of Health v. Schmades*, 10 Abb. Pr. N. S. (N. Y.) 205.

<sup>160</sup> *Paine v. Spratley*, 5 Kan. 525.

<sup>161</sup> *Wandsworth B'd of Works v. United Teleph. Co.*, L. R. 13 Q. B. D. 904.

<sup>162</sup> *Mason v. Police Jury*, 9 La. An. 368 ; *St. Louis v. Laughlin*, 49 Mo. 559 ; *Moseley v. Tift*, 4 Fla. 402 ; and cases *infra*.

<sup>163</sup> *Bennett v. Birmingham*, 31 Pa. St. 15. But a provision authorizing a city to license, at any annual charge, "omnibuses or vehicles in the nature thereof," was construed to authorize such a charge for the use of street cars : *Frankfort, etc., Ry. Co. v. Philadelphia*, 58 Pa. St. 119.

<sup>164</sup> *Rutherford v. Maynes*, 97 Pa. St. 78.

<sup>165</sup> *Indiana, etc., Ry. Co. v. Attica*, 56 Ind. 476.

rights of property may be affected or municipal liability incurred, must, upon pain of vitiating the entire proceeding, be strictly pursued;<sup>166</sup> and all rights and powers of a jurisdictional or discretionary kind must be exercised in strict conformity with its letter and spirit.<sup>167</sup> A joint power granted to five commissioners cannot be exercised by four of them;<sup>168</sup> nor a discretion vested in one body or person, *e. g.*, in the city councils, delegated to another, *e. g.*, the mayor and aldermen.<sup>169</sup> And where a board, such as a board of county commissioners, propose to do any deliberative act which shall be binding upon absent members, it must be done at a regular meeting, or a regular adjourned meeting, or, if at a special meeting, notice thereof must be served, if possible personally, upon every member entitled to be present.<sup>170</sup> And this applies equally to public and private corporations.<sup>171</sup> Alike applicable to both is the principle that] rules and by-laws, are construed like other provisions encroaching on the ordinary rights of persons. They must, on pain of invalidity, be reasonable, and not in excess of the statutory power authorizing them, or repugnant to that statute or to the general principles of law (*a*). [Thus, an ordinance passed by the councils of a borough establishing fire-limits in the borough and prohibiting the erection of

<sup>166</sup> *Shawnee Co. v. Carter*, 2 Kan. 115.

<sup>167</sup> *Garrigus v. B'd of Comm'rs*, 39 Ind. 66.

<sup>168</sup> *Geter v. Comm'rs*, 1 Bay (S. C.) 354. A commissioner's court cannot delegate to an architect the authority conferred upon them to contract for the construction of a court-house, but may authorize him to make a contract, subject to their approval: *Russell v. Cage*, 66 Tex. 428.

<sup>169</sup> *State v. Fiske*, 9 R. I. 94.

<sup>170</sup> *Pike Co. v. Rowland*, 94 Pa. St. 238.

<sup>171</sup> *Ibid.* See, as to private corporations, *Roberts v. Price*, 16 L. J. C. P. 169; *Moore v. Hammond*, 6 B. & C. 456. But a power given to the Board of Directors of an Insurance Company to settle losses may be delegated to a committee:

*Mercer Co., etc., Ins. Co. v. Stranahan*, 104 Pa. St. 246.

(*a*) See *Hacking v. Lee*, 2 E. & E. 910, 29 L. J. 206; *Exp. Davis*, L. R. 7 Ch. 526; *Bentham v. Hoyle*, 3 Q. B. D. 289. See, also, *Hall v. Nixon*, L. R. 10 Q. B. 153; *Young v. Edwards*, 33 L. J. M. C. 227; *Hattersley v. Burr*, 4 H. & C. 153; *Brown v. Holyhead Board*, 1 H. & C. 601; *Fielding v. Rhyl*, 3 C. P. D. 272; *Saunders v. S. E. R. Co.*, 5 Q. B. D. 456; *Dyson v. Lond. & N. W. R.*, 7 Q. B. D. 32; *Ashenden v. Lond. & Br. R. Co.*, 5 Ex. D. 190; *Dearden v. Townsend*, L. R. 1 Q. B. 11; *Torquay v. Bridle*, 47 J. P. 183. [It would be impossible to pursue the general subject of this section beyond the statement of a few illustrative principles. For details see *Dillon on Municipal Corporations*; *Angell and*

frame buildings within the same, was declared inoperative, as, under the circumstances, an unreasonable exercise of the legislative powers conceded to such corporations.<sup>172</sup> So,] a local act which authorized a navigation company to make by-laws for the orderly using of the navigation, and for the governing of the boatmen carrying merchandize on it, was held not to authorize a by-law which closed the navigation on Sundays, and prohibited the use of any boat on it, except for going to church (a). [So, where building associations are authorized to impose fines upon their members for delinquencies, it has been uniformly held that the fines imposed must be reasonable, and that the imposition of fines upon fines, or an increase of fines for continued delinquencies, upon the principle of arithmetical progression, is unwarranted.<sup>173</sup> Again] where a charter which founded a school empowered the governors to remove the master at their discretion, and also authorized them to make by-laws; it was held that a by-law ordaining that the master should not be removed unless sufficient cause was exhibited in writing against him, signed by the governors, and declared by them to be sufficient, was void; for the power to make by-laws did not authorize the making of one which restrained and limited the powers originally given to the governors by the founder. This was in effect to alter the constitution of the school (b).

§ 353. [As to statutes generally, conferring powers, it

Ames, Field, Morawetz, on Corporations, and similar works. A by-law requiring the consent of all the stockholders to a transfer of stock by a member is void as against public policy: *Sleeper v. Goodwin*, 67 Wis. 577.]

<sup>172</sup> *Kneedler v. Norristown*, 100 Pa. St. 368.

(a) *Calder and Hebble Nav. Co., v. Pilling*, 14 M. & W. 76.

<sup>173</sup> *Hagerman v. Build'g & Sav. Ass'n*, 25 Ohio St. 186; *Second N. Y. Build'g Ass'n v. Gallier*, cited in *Cit. Mut. Loan, etc., Ass'n v. Webster*, 25 Barb. (N. Y.) 263; *Lynn v. Build'g Ass'n, (Pa.)* 9 Centr. Rep. 360. And see *Occident, B. & L. Ass'n v. Sullivan*, 62 Cal.

394.

(b) *R. v. Darlington School*, 6 Q. B. 682, questioned by Lord Hatherly in *Dean v. Bennett*, L. R. 6 Ch. 489. See, also, *R. v. Cutbush*, 4 Burr. 2204; *R. v. Wood*, 5 E. & B. 49; *Chilton v. London and Croydon R. Co.*, 16 M. & W. 212; *Williams v. G. W. R. Co.*, 10 Ex. 16; *Hutton v. Scarborough Hotel*, 2 Dr. & Sm. 521, 34 L. J. 643; *R. v. Rose*, 5 E. & B. 49, 24 L. J. 130; *Bostock v. Staffordshire R. Co.*, 3 Sm. & G. 283, 25 L. J. 325; *United Land Co. v. G. E. R. Co.*, L. R. 10 Ch. 587; *Norton v. London & N. W. R. Co.*, 9 Ch. D. 623, 47 L. J. 859; *Shillito v. Thompson*, 1 Q. B. D. 12.



may be said to be the result of the vast number of decisions upon questions arising under such enactments, that "a purely statutory authority or right must be pursued in strict compliance with the terms of the statute."<sup>174</sup>] Thus, the power given by the 43 Eliz. c. 2, to justices to appoint "four, three, or two substantial householders," as parish overseers, is not well executed by appointing more than four (a); or by appointing a single one, even when he is the only householder in the parish (b). The 355th section of the Merchant Shipping Act, 1854, which empowers the Board of Trade to give the master of a ship a certificate to pilot "any ships belonging to the same owner," was construed as requiring that the name of the owner should be mentioned in the certificate; and a certificate representing another person as the owner was held not granted in compliance with the statute (c). Where trustees, who were authorized to borrow 30,000*l.* for building a chapel, and to levy the amount, with interest, by a rate, borrowed 32,000*l.*, and made a rate to pay the interest on the whole of that sum, it was held, not only that they had exceeded their power, but that the rate was bad in toto (d). [And where an act authorized the formation of a certain number of banks, it was held, that, the number having been completed, no new banks could be organized in the places of such, as, from time to time, ceased to do business.<sup>175</sup> Nor would a

<sup>174</sup> Bish., *Wr. L.*, § 119, citing a large number of cases.

(a) *R. v. Loxdale*, 1 *Burr.* 145; See *R. v. All Saints*, 13 *East*, 143.

(b) *R. v. Cousins*, 4 *B. & S.* 849, 33 *L. J.* 87; *R. v. Clifton*, 2 *East*, 168. Comp. *Preece v. Pulley*, 49 *L. J.* 686, and comp. under Trustee Act, 1850, s. 32, *Shipperdson's Trusts*, 49 *L. J. Ch.* 619; *Stokes' Trusts*, *L. R.* 13 *Eq.* 333; *Harford's Trusts*, 13 *Ch. D.* 185.

(c) *The Earl of Auckland*, 30 *L. J. P. M. & A.* 121, 127.

(d) *Richter v. Hughes*, 2 *B. & C.* 499.

<sup>175</sup> *State v. Chase*, 5 *Ohio St.* 528. The power was held exhausted by the first exercise of it. Compare the decision in *Schepp v. Reading*, 2 *Woodw. (Pa.)* 460, where it

was held, that, where an act authorized a company to appropriate, from time to time, such springs and streams as it might select, for the purpose of bringing into a city, for the supplying of which with water the company was organized, an additional supply thereof, and at one time the company diverted a small portion of a certain stream, its rights were not confined to a single appropriation of any stream, so as to exhaust its powers when any water, however minute in quantity, had been diverted; but neither did such an appropriation vest the right to the entire stream in the company, so as to debar the sub-riparian landholder's claim for damages by a lapse of the time prescribed for

power to charter gas companies, the meaning of that term, as gathered from the provisions of the statute conferring the power, being companies manufacturing and furnishing the manufactured gas, authorize the incorporation of companies to supply natural gas to consumers."<sup>176</sup>]

§ 354. **Acts Investing Private Persons with Privileges. Corporations.**—As regards enactments of a local or personal character, which confer any exceptional exemption from a common burden (*a*), or invest private persons or bodies, for their own benefit and profit, with privileges and powers interfering with the property or rights of others, they are construed more strictly, perhaps, than any other kind of enactment. The Courts take notice that they are obtained on the petitions framed by their promoters; and in construing them, regard them, as they are in effect, contracts between those persons, or those whom they represent, and the Legislature on behalf of the public. Their language is therefore treated as the language of their promoters, who asked the Legislature for them; [the promoters, rather than the Legislature, being considered as the framers;<sup>177</sup>] and when doubt arises as to the construction of that language, the maxim, ordinarily inapplicable to the interpretation of statutes, that *verba cartarum fortius accipiuntur contra proferentem*, or that words are to be understood most strongly against him who uses them, is justly applied. The benefit of the doubt is to be given to those who might be prejudiced by the exercise of the powers which the enactment grants, and against those who claim to exercise them (*b*). Even if such statutes were not regarded

bringing an action for such damages against the company; but each new appropriation of a greater quantity of water from the same stream gave new rights of action.

<sup>176</sup> *Emerson v. Com'th*, 108 Pa. St. 111. See *Addenda* to § 350.

(*a*) See *ex. gr. Perchard v. Heywood*, 8 T. R. 466.

<sup>177</sup> *Raleigh, etc., R. R. Co. v. Reid*, 64 N. C. 155. See, also, *Wilmington, etc., R. R. Co. v. Reid*, *Id.* 226; *McAdeh v. Jenkins*, *Id.* 796.

(*b*) See among many authorities,

*R. v. Croke*, *Cowp.* 301, *Lofft*, 438; *Gildart v. Gladstone*, 11 East, 685; *Hull Dock Co. v. La March*, 8 B. & C. 52; *Dudley Canal Co. v. Grazebrook*, 1 B. & Ad. 59; *Hull Dock Co. v. Browne*, 2 B. & Ad. 58; *Per Patteson, J.*, in *R. v. Cumberworth*, 4 A. & E. 741; *Blakemore v. Glamorgan-shire Canal Co.*, 1 M. & K. 154; *Webb v. Manchester R. Co.*, 4 Myl. & C. 116; *Stockton and Darlington R. Co. v. Barrett*, 11 Cl. & F. 590, 7 M. & Gr. 870; *Scales v. Pickering*, 4 Bing. 448; *Parker v. G. W. R.*, 7 M. & Gr.

in the light of contracts (a), they would seem to be subject to strict construction on the same ground as grants from the Crown, to which they are analogous, are subject to it. As the latter are construed strictly against the grantee, on the ground that prerogatives, rights, and emoluments are conferred on the Crown for great purposes and for the public use, and are therefore not to be understood as diminished by any grant beyond what it takes away by necessary and unavoidable construction (b); so the Legislature, in granting away, in effect, the ordinary rights of the subject, should be understood as granting no more than passes by necessary and unavoidable construction. A corporation, indeed, constituted by statute for certain purposes, is regarded as so entirely the creature of the statute, that acts done by it without the prescribed formalities, or for objects foreign to those for which it was formed, would be, in general, null and void (c). [In so far as the rights granted to corporations are destructive of, or encroach upon, public or common right, they are undoubtedly to be construed most strongly against those setting them up, and in favor of the state or public; they are not to be extended beyond the express words in which they are given, or their clear import; and whatever is not given in unequivocal terms, is to be deemed as expressly withheld.<sup>178</sup> And even in their

253; *Eversfield v. Mid-Sussex R. Co.*, 3 DeG. & J. 286; *Simpson v. S. Staffordshire Water-works*, 34 L. J. Ch. 380; *R. v. Wycombe*, L. R. 2 Q. B. 310; *Morgan v. Metropolitan R. Co.*, L. R. 4 C. P. 97; *Fenwick v. East London R. Co.*, L. R. 20 Eq. 544; *per Cockburn, C. J.*, in *Hipkins v. Birmingham Gas Co.*, 6 H. & N. 250; *Atty.-Genl. v. Furness R. Co.*, 47 L. J. Ch. 776; *Lamb v. N. London R. Co.*, L. R. 4 Ch. 522; *Clowes v. Staffordshire Potteries*, L. R. 8 Ch. 125.

(a) See *R. v. York and Midland R. Co.*, 1 E. & B. 858. [A statute, though containing the elements of a contract, is nevertheless to be construed as a statute: *Union Pac. R. Co. v. U. S.*, 10 Ct. of Cl. 548; *aff'd* 91 U. S. 72. *Comp. Huidekoper v. Douglass*, 4 Dall. 391; 3

*Cranch*, 1; *Rice v. R. R. Co.*, 1 Black, 358.]

(b) *Per* Lord Stowell in *The Rebeckah*, 1 Rob. 230.

(c) *Chambers v. Manchester, etc., R. Co.*, 5 B. & S. 588.

<sup>178</sup> See *Moran v. Comm'rs*, 2 Black, 722; *Sprague v. Birdsall*, 2 Cow. (N. Y.) 419; *Rathbun v. Acker*, 18 Barb. (N. Y.) 398; *McAfee v. R. R. Co.*, 36 Miss. 669; *Bridge Co. v. R. R. Co.*, 13 N. J. Eq. 81; 1 Wall. 116; *Camden, etc., R. R. Co. v. Briggs*, 22 N. J. L. 623; *Jersey City v. R. R. Co.*, 40 N. J. Eq. 417; *Jersey City, etc., Co. v. Consumers' Gas Co.*, Id. 427; *Stormfeltz v. Turnp. Co.*, 13 Pa. St. 555; *J'k of Pa. v. Com'th*, 19 Id. 144; *Iacker v. R. R. Co.*, Id. 211; *Pa. R. R. Co. v. Canal Comm'rs*, 21 Id. 9; *Allegheny v. R. R. Co.*, 28 Id. 355; *Dugan v.*

own internal affairs, they are held to strict and rigid conformity with the powers granted and the manner of their exercise prescribed by the statutes under which they have their being. Thus, where an act authorized certain corporations to increase their capital stock, allotting the increased shares to the stockholders pro rata, and a company coming within the purview of the act increased its stock and allotted one share of the new issue to the holder of every two shares of the old, but upon condition that he pay \$10. per share for every share of the new stock issued to him, and also \$10 for the privilege of taking it, the condition was held incompetent, and the company compelled to issue the proportionate number of shares coming to the complainant without his being obliged to make the payments demanded.<sup>179</sup> But the strictness that is to be applied to the construction of a grant of corporate franchises is in no case permitted to be such as would defeat the object of the grant; so that a power given to a company to connect "their" railroad with another, authorizes such connection of a road owned by the company in pursuance of a purchase by it, as well as one actually constructed by it,<sup>180</sup> and a power to mortgage its property for the erection of a building, authorizes a mortgage for painting it.<sup>181</sup> A legislative grant is, indeed, like any other legislative enactment, to be construed, if possible, so as to effect the intent of the grantors; if that intent is doubtful, under the statute making it, the rule of construction recognized as applicable, requires the doubt to be resolved against the

Bridge Co., 27 Id. 303; Com'th v. R. R. Co., Id. 339; West Branch Boom Co. v. Dodge, 31 Id. 285; Com'th v. Pass. Ry. Co., 52 Id. 506; Pa. R. R. Co.'s App., 37 Leg. Int. (Pa.) 125; Hartford Bridge Co. v. Ferry Co., 29 Conn. 210; Currier v. R. R. Co., 11 Ohio St. 228; Indianapolis, etc., R. R. Co., v. Kinney, 8 Ind. 402; Young v. McKenzie, 3 Ga. 31; Mayor v. R. R. Co., 7 Id. 221; Sugar v. Sackett, 13 Id. 462; Raleigh, etc., R. R. Co. v. Reid, 64 N. C. 155.

<sup>179</sup> Cunningham's App., 108 Pa. St. 546. And a statutory

power to "make by-laws" for the sale of stock for unpaid assessments does not authorize a sale in the absence of a by-law providing for the same: Budd v. Ry. Co. (Or.) 15 Pacif. Rep. 659.

<sup>180</sup> Cleveland, etc., R. R. Co. v. Erie, 27 Pa. St. 380.

<sup>181</sup> Miller v. Chance, 3 Edw. (N. Y.) 399. And an act, allowed to be done by a majority of a board consisting of nine trustees and two ex officio members, was held well done by five, not including the two ex officio members: Ibid.

grantee, in favor of the public ;<sup>185</sup> or, in analogy to another familiar principle of statutory interpretation,<sup>186</sup> the construction is to be such as will make it accord with subsequent legislation.<sup>184</sup>]

§ 355. The principle of strict construction is less applicable where the powers are conferred on public bodies for essentially public purposes ; as, for instance, to those given to the Metropolitan Board of Works (*a*).

§ 356. **Acts Conferring Exemptions from Common Burdens or Surrendering Public Rights.**—[It is a settled presumption, in the construction of statutes, that the Legislature does not, without express declarations or clear and unmistakable manifestation of intent, mean to be understood as giving away any public right or stripping the state of any part of its prerogative.<sup>187</sup> Upon this presumption, as well as upon the consideration of the interested origin<sup>188</sup> of statutes conferring particular exemptions from general burdens, *e. g.*, of taxation, rests the rule that all such enactments are to receive a strict construction.<sup>187</sup> For instance, a lot of ground upon which a church is being erected, was held not exempt from taxation under an act which exempted "churches, meeting-houses, and other regular places of stated worship," especially when read together with a constitutional provision permitting exemptions only in certain specific cases, among which are enumerated "actual places of religious worship."<sup>188</sup> But, whilst the

<sup>182</sup> *Rice v. R. R. Co.*, 1 Black, 358.

<sup>183</sup> See ante, § 47.

<sup>184</sup> *Maysville Turnp. Co. v. How*, 14 B. Mon. (Ky.) 426.

(*a*) *Per Wood, V. C.*, in *N. London R. Co. v. Metrop. B. of Works*, Johns. 405, 28 L. J. Ch. 909. See, also, *Pallister v. Gravesend*, 9 C. B. 774 ; *Galloway v. London (Mayor of)*, L. R. 1 H. L. 34 ; *Quinton v. Bristol (Mayor of)*, L. R. 17 Eq. 524 ; *Atty.-Genl. v. Cambridge*, L. R. 6 H. L. 303 ; *Richmond v. N. London R. Co.*, L. R. 3 Ch. 681 ; *Lyon v. Fishmongers' Co.*, 1 App., 669 ; *Venour's Case*, 2 Ch. D. 522. [See *Sedgw.* 326.]

<sup>185</sup> *Water Comm'rs v. Hudson*,

13 N. J. Eq. 420 ; *Academy of Fine Arts v. Philadelphia*, 22 Pa. St. 496 ; *Erie Ry. Co. v. Com'th*, 66 Id. 84 ; *Com'th v. R. R. Co.*, 2 Pears. (Pa.) 389 ; *Bennett v. McWhorter*, 2 W. Va. 441. See, also, *Bourgignon B. A., v. Com'th*, 98 Pa. St. 54. And see ante, §§ 162-164.

<sup>186</sup> Ante, § 354.

<sup>187</sup> *State v. Mills*, 34 N. J. L. 177 ; *Com'th v. Canal Co.*, 32 Md. 501 ; *Cincinnati College v. Ohio*, 19 Ohio, 110 ; and cases in preceding note and *infra*. See, also, *Buffalo City Cemetery v. Buffalo*, 46 N. Y. 506 ; *Republic v. Hamilton*, 21 Ill. 53.

<sup>188</sup> *Mullen v. Erie Co.*, 85 Pa. St. 288. Comp. ante, § 95.

person claiming the exemption must, in obedience to the rule of strict construction, bring himself within both the letter and spirit of the enactment, the rule applies in such cases as well as in those of other statutes, penal as well as remedial, that other acts in *pari materia* may be consulted to ascertain the intent of the Legislature.<sup>189</sup> And where a statute prescribing a less rate of taxation for certain classes of property, *e. g.*, rural lands taken into a city, is designed, not to confer a special privilege or exemption, but to make an equitable distribution of the tax-burden, it is to be more liberally construed as affecting the claimant.<sup>190</sup>]

<sup>189</sup> See *Hannibal, etc., R. R. Co. v. Shacklett*, 30 Mo. 550. It was held in this case, that the roadbed, machinery and depots of a railway company, and other property used by it in operating the road, are to be deemed part of and represented

by its capital stock, and not taxable as "property owned by incorporated companies over and above their capital stock."

<sup>190</sup> *Gillette v. Hartford*, 31 Conn. 851.

## CHAPTER XIII.

USAGE AND CONTEMPORANEOUS CONSTRUCTION. LEGISLATIVE  
CONSTRUCTION. CHANGE OF LANGUAGE, ETC.

- § 357. Contemporaneous Exposition.
- § 358. Judicial and Professional Practice and Usage.
- § 360. Departmental, etc., Usage.
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§ 357. **Contemporaneous Exposition.**—It is said that the best exposition of a statute or any other document is that which

it has received from contemporary authority. *Optima est legum interpret consuetudo* (a). *Contemporanea expositio est optima et fortissima in lege* (b). Where this has been given by enactment<sup>1</sup> or judicial decision,<sup>2</sup> it is of course to be accepted as conclusive (c). But further, the meaning publicly given by contemporary, or long professional usage, is presumed to be the true one, even when the language has etymologically or popularly a different meaning. Those who lived at or near the time when it was passed, may reasonably be supposed to be better acquainted, than their descendants, with the circumstances to which it had relation, as well as with the sense then attached to legislative expressions (d); and the long acquiescence of the Legislature in the interpretation put upon its enactment by notorious practice, may, perhaps, be regarded as some sanction and approval of it (e). ["It gives the sense of community of the terms made use of by the Legislature. If there is ambiguity in the language, the understanding and application of it when the statute first

(a) Dig. i. 3, 37. [See Bish., *Wr. L.*, § 104.]

(b) 2 Inst. 11; [Phila. & Erie R. Co. v. Catawissa R. R. Co., 53 Pa. St. 20, 61; Grant v. Hickox, 64 Id. 334, 336; Packard v. Richardson, 17 Mass. 121, 143.]

<sup>1</sup> See Phila. & E. R. R. Co. v. C. R. R. Co., *supra*.

<sup>2</sup> See Grant v. Hickox, *supra*.

(c) See *ex. gr.* *per* Hullock, B., in Booth v. Ibbotson, 1 Yo. & J. 360; *per* Tindal, C. J., in Bank of England v. Anderson, 3 Bing. M. C. 666; *per* Parke, B., in Doe v. Owens, 10 M. & W. 521; *per* Martin, B., in Curlew v. Mornington, 7 E. & B. 283. [The fact that a statute was omitted, and another of later date upon the same subject published, by the digesters of the laws of a state, contemporaneous with the enactment of the later statute, and shortly after it had become a law, is referred to, in Weiss v. Iron Co., 58 Pa. St. 295, 302, by Sharswood, J., an eminent jurist, as some indication that the latter should be construed as repealing the former by implication. See, to similar effect, McMicken v. Commonwealth, 58

Pa. St. 213, 219.]

(d) Co. Litt. 8 b.; 2 Inst. 18, 282; Bac. Ab. Stat. I. 5; 2 Hawk. c. 9, s. 3; Sheppard v. Gosnold, Vaugh. 169; *per* Lord Mansfield in R. v. Varlo, Cowp. 250; *per* Lord Kenyon in Leigh v. Kent, 3 T. R. 364, Blankley v. Winstanley, Id. 286, and R. v. Scott, Id. 604; *per* Buller, J., in R. v. Wallis, 5 T. R. 380; *per* Lord Ellenborough in Kitchen v. Bartsch, 7 East, 53; *per* Best, C. J., in Stewart v. Lawton, 1 Bing. 377; *per* Lord Hardwicke in Atty. Genl. v. Parker, 3 Atk. 576; *per* Lord Eldon in Atty.-Genl. v. Forster, 10 Ves. 338; *per* Parke, B., in Jewison v. Dyson, 9 M. & W. 556, and Clift v. Schwabe, 3 C. B. 469; R. v. Mashiter, 6 A. & E. 153; R. v. Davie, Id. 374; Newcastle v. Atty.-Genl., 12 Cl. & F. 419; Smith v. Lindo, 4 C. B. N. S. 395; R. v. Herford, 3 E. & E. 115; Atty.-Genl. v. Jones, 2 H. & C. 347; Marshall v. Bp. of Exeter, 13 C. B. N. S. 820, 31 L. J. M. C. 262; Montrose Peerage, 1 Macq. H. E. 401.

(e) See *per* James, L. J., in The Anna, 1 P. D. 259.



comes into operation, sanctioned by a long acquiescence on the part of the Legislature and judicial tribunals, is the strongest evidence that it has been rightly explained in practice.”<sup>3</sup>] It often becomes, therefore, material to inquire what has been done under an Act; this being of more or less cogency, according to circumstances, for determining the meaning given by contemporaneous exposition (*a*). [A notable instance, in recent judicial history, is the case, in which, upon the trial of an information at the suit of the Attorney-General, against a member of the House of Commons for voting without having taken the oath of allegiance within the meaning of the Parliamentary Oaths Act of 1866, as amended by the Promissory Oaths Act of 1868, evidence of the practice observed in that body as to taking the oath of allegiance was held admissible for the purpose of explaining the construction of those statutes.<sup>4</sup> Even where, were the matter *res integra*, the construction of a statute would be different, that placed upon it by contemporaneous exposition and long usage under it, will often prevail. Thus, of an early and generally prevailing practical construction of a power given by an act to dispose of lands as including a power to sell and convey the common lands, it was said, that “long and continued usage furnishes a contemporaneous construction which must prevail over the mere technical import of words.”<sup>5</sup>]

§ 358. **Judicial and Professional Practice and Usage.**—It has been sometimes said, indeed, that usage is only the interpreter of an obscure law,<sup>6</sup> but cannot control the language

<sup>3</sup> Packard v. Richardson, 17 Mass. 121, 143. See, also, in support of the same principle: McKean v. Delancy, 5 Cranch, 22; Hahn v. U. S., 107 U. S. 402; Rogers v. Goodwin, 2 Mass. 475; Op. of Justices, 3 Pick. (Mass.) 517; Steiner v. Coxe, 4 Pa. St. 13, 28; Graham's App., 1 Dall. (Pa.) 136; Kenion v. Hill, 1 La. An. 419; Morrison v. Barksdale, Harp. (S. C.) 101, and cases *infra*. In French v. Cowan, (Me.) 4 New Eng. Rep. 682, 686, it is said: “In construing statutes applicable to public corporations, courts will attach no slight weight

to the uniform practice under them, if this practice has continued for a considerable period of time;” *cit.* Sherwin v. Bugbee, 16 Vt. 444; State v. Cook, 20 Ohio St. 259; State v. Severance, 49 Mo. 401 (city ordinance).

(*a*) R. v. Canterbury (Abp. of), 11 Q. B. 581, *per* Coleridge, J.

<sup>4</sup> Atty.-Genl. v. Bradlaugh, (C. A.) L. R. 9 Q. B. D. 667.

<sup>5</sup> Rogers v. Goodwin, 2 Mass. 475, 477-8.

<sup>6</sup> Bailey v. Rolfe, 16 N. H. 247. And see Chestnut v. Shane, 16 Ohio, 599.

of a plain one ;' and that if it has put a wrong meaning on unambiguous language, [or is contrary to its obvious meaning,'] it is rather an oppression of those concerned than an exposition of the act, and must be corrected (*a*). It may, indeed, well be the rule, as Lord Eldon laid it down in a case of a breach of trust of charity property, that if the enjoyment of property had been clearly a continued breach for even two centuries, of a trust created by a deed or will, it would be just and right to disturb it (*b*). But it seems different where the Legislaturé has stood by and sanctioned by its uninterposition the construction put upon its own language by long and notorious usage ; and the proposition above stated certainly falls short of the full effect which has been often given to usage. Authorities are not wanting to show that where the usage has been of an authoritative and public character, its interpretation has materially modified the meaning of apparently unequivocal language. Thus, the statute 1 Westm. c. 10, for instance, which enacts that coroners shall be chosen of the most legal and wise knights, has always been understood to admit of the election of coroners who are not knights (*c*). So, a power given by the 6 Hen. 8, c. 6, to the judges of the Queen's Bench, to issue a writ of procedendo, was held, from the course or practice, to be exercisable by a single judge at chambers (*d*). Although the 31 Eliz. c. 5, which limited the time for bringing actions on penal statutes to two years, when the action was brought for the Queen, and to one year, when brought as well for the Queen as for the informer, was silent as to actions brought for the informer alone ; it was held, partly on the ground of long professional understanding, that the last-mentioned actions were limited to one year (*e*). Though the 15 Rich. 2 enacted that the Admiralty should have no jurisdiction

<sup>7</sup> Atty.-Genl. v. Bank, 5 Ired. Eq. (N. C.) 71; Bailey v. Rolfe, *supra*.

<sup>8</sup> Atty.-Genl. v. Bank, *supra*.

(*a*) R. v. Canterbury, *supra*; Vaugh. 170; and *per* Lord Brougham in Dunbar v. Roxburgh, 8 Cl. & F. 354; *per* Grose, J., in R. v. Hogg, 1 T. R. 728; *per* Pollock, C. B., in Gwyn v. Hard-

wicke, 1 H. & N. 53, and in Pochin v. Duncombe, *Id.* 856.

(*b*) *Per* Lord Eldon in Atty.-Genl. v. Bristol, 2 Jac. & W. 321.

(*c*) 2 Hawk. c. 9, s. 2.

(*d*) R. v. Scaife, 17 Q. B. 238. See Leigh v. Kent, 3 T. R. 362. Also: Stuart v. Laird, 1 Cranch, 299, post, § 527.

(*e*) 8 Anne, c. 14; Dyer v. Best. L. R. 1 Ex. 152.

over contracts made in the bodies of counties, seamen engaging in England have, nevertheless, always been admitted to sue for wages in that Court (*a*), where the remedy is easier and better than in the Common Law Courts; on the ground, it has been said (*b*), that *communis error facit jus*;<sup>9</sup> or rather, as was observed by Lord Kenyon (*c*), not *communis error*, but uniform and unbroken usage, *facit jus*. "Were the language obscure," said Lord Campbell in a celebrated case, "instead of being clear, we should not be justified in differing from the construction put upon it by contemporaneous and long continued usage. There would be no safety for property or liberty if it could be successfully contended that all lawyers and statesmen have been mistaken as to the true meaning of an old Act of Parliament" (*d*). If we find an uniform interpretation of a statute materially affecting property and perpetually recurring, and which has been adhered to without interruption, it would be impossible to introduce the precedent of disregarding that interpretation (*e*). [On the contrary, such an interpretation, under which property rights have been acquired,<sup>10</sup> from a change of which infinite mischief would result,<sup>11</sup> will be upheld, if possible; nor can a long settled practice be disregarded, although it originated in error.<sup>12</sup>] The Central Criminal Court Act, 4 & 5 Will. 4, c. 36, which empowers the judges of that Court, or any "two or more" of them, to try all offences which might be tried under a commission of oyer and terminer for London or Middlesex, was construed to authorize a single judge to try; such having been the inveterate practice under the Act (*f*). When the question

(*a*) *Smith v. Tilley*, 1 Keb. 712.

(*b*) *Per* Lord Holt in *Clays v. Sudgrave*, 1 Salk. 33.

<sup>9</sup> See recognition of this principle as to conveyances of property by married women without acknowledgment, etc., in *Davey v. Turner*, 1 Dall. (Pa.) 11, 13; *Lloyd v. Taylor*, Id. 17; *Kirk v. Dean*, 2 Binn. (Pa.) 341, 345.

(*c*) In *R. v. Essex*, 4 T. R. 594.

(*d*) *Gorham v. Bp. of Exeter*, 15 Q. B. 73. See, also, *per* Cur. in *Hebbert v. Purchas*, L. R., 3 P. C. 650.

(*e*) *Per* Lord Westbury, in *Morgan v. Crawshay*, L. R. 5 H. L. 304, 320.

<sup>10</sup> *Re Warfield*, 23 Cal. 51; *Brown v. State*, 5 Col. 496.

<sup>11</sup> *Van Loon v. Lyon*, 4 Daly, (N. Y.) 149.

<sup>12</sup> *State v. Chase*, 5 Har. & J. (Md.) 303.

(*f*) *R. v. Levenson*, L. R. 4 Q. B. 394. See *Stuart v. Laird*, 1 Cranch, 299; and *per* James, L. J., in *The Anna*, 1 P. D. 259. Comp. however, *Clow v. Harper*, 3 Ex. D. 198.

arose whether a person convicted at one time of several offences could be considered, at the time of the adjudication, as "in prison undergoing imprisonment," within the 25th sect. of the 11 & 12 Vict. c. 43 (which authorizes the convicting justice, in that case, to make the period of imprisonment for the second offence begin from the expiration of that of the first), it was decided in the affirmative, partly, indeed, in conformity with the construction put on the analogous enactment in the 7 & 8 Geo. 4, c. 28, but partly also in consequence of the practice of the judges for forty years (a).

§ 359. In all these cases, a contrary resolution would, to use the words of Parker, C. J., (b) have been an overturning of the justice of the nation for years past. [It is, of course, impossible to lay down any rule as to the length of time required to make usage an authoritative expounder of a statute. In one case it was said, that, "where you can carry back the usage for a century, and have no proof of a contrary usage before that time, you fairly reach the period of contemporanea expositio."<sup>13</sup> In other cases, an unbroken usage of 500 years,<sup>14</sup> of 200 years,<sup>15</sup> of a century,<sup>16</sup> of 50 years,<sup>17</sup> of 40 years,<sup>18</sup> of 30 years or more,<sup>19</sup> is appealed to for the purposes of exposition. But it may, in general, be said, that the force of contemporaneous exposition, or the exposition involved in professional usage, is most properly confined to old statutes; whereas a recent statute, when brought into controversy, is to be construed according to its terms, not according to the views taken of it by the parties in interest.<sup>20</sup> And, although in this country a statute may be termed, and treated as, an old statute, which, in England,

(a) *R. v. Cutbush*, L. R. 2 Q. B. 573. See, also, the *Duke of Buccleuch v. Metrop. B. of Works*, L. R. 5 Ex. 251; *Mignault v. Malo*, 4 P. C. 123, 136.

(b) In *R. v. Bewdley*, 1 P. Wms. 223.

<sup>13</sup> *Dunbar v. Roxburgh*, 3 Cl. & Fin., at p. 354.

<sup>14</sup> *Mansell v. R.*, 8 E. & B. 54, 72, 111.

<sup>15</sup> *Gorham v. Exeter*, 15 Q. B. 52, 69.

<sup>16</sup> *Packard v. Richardson*, 17 Mass. 121, 143.

<sup>17</sup> *Lord Fermoy's Claim to Vote*, 5 H. L. C. 729, 785.

<sup>18</sup> *R. v. Cutbush*, *supra*.

<sup>19</sup> *Pease v. Peck*, 18 How. 595; *U. S. v. Recorder*, 1 Blatchf. 218, 223; *Clark v. Dotter*, 54 Pa. St. 215, 216.

<sup>20</sup> *Clyde Nav. Trustees v. Laird*, L. R. 8 App. Cas. 673, *per* Lord Watson.

would not be so regarded or treated, yet, *mutatis mutandis*, the principle just stated would seem to be here recognized."

§ 360. **Departmental, etc., Usage.**—[It is not only the practice of courts in regard to statutes that is respected by the superior courts,—although it is said, that, where the construction of an act is doubtful, one long acted upon by the inferior courts will generally be adopted by the supreme tribunal<sup>21</sup>—but of almost equal dignity is the practical construction put upon an act by the governmental officers particularly charged with its execution,<sup>22</sup> especially where so long continued as to have grown into a rule of departmental practice.<sup>23</sup> Thus the construction of a statute adopted and acted upon, by the executive, in the execution of his duty to give effect to the laws,<sup>24</sup> or by the secretary of the treasury;<sup>25</sup> or the construction of a general insurance law of a state by its attorney-general and other officers required to act under it,<sup>26</sup> will, in cases of doubt and ambiguity,—but, it is said, only in such cases,<sup>27</sup>—be adopted by the courts; or, at least, not disregarded by them, except for cogent reasons.<sup>28</sup> As, however, no such usage can alter the law, it cannot, in any proper sense, be binding upon the courts, bound as they are, to construe all laws coming before them according to their own judicial views.<sup>29</sup> Nor, on the re-enactment of a statute, with additions, would the departmental construction of the original act control the construction of the new one, especially where this would make some part of the additions repugnant

<sup>21</sup> See *Packard v. Richardson*, 17 Mass. 121; *Chestnut v. Shane*, 16 Ohio, 599.

<sup>22</sup> *Plummer v. Plummer*, 37 Miss. 185; and see *Clark v. Dotter*, 54 Pa. St. 215.

<sup>23</sup> *Stuart v. Leigh*, 1 Cranch, 299; *U. S. v. Bank*, 6 Pet. 29; *Edward v. Darby*, 12 Wheat. 206; *Union Ins. Co. v. Hoge*, 21 How. 35; *U. S. v. Moore*, 95 U. S. 760; *Brown v. U. S.*, 113 Id. 569; *The Laura*, 114 Id. 411; *Mathews v. Shores*, 24 Ill. 27; *Goddard v. Gioninger*, 5 Watts (Pa.) 209; *Westbrook v. Miller*, 56 Mich. 148; *Scanlan v. Childs*, 33 Wis. 663; and cases *infra*.

<sup>24</sup> *U. S. v. Gilmore*, 8 Wall. 330; so, at least, as to bind the depart-

ment as to transactions past before the rule is changed: *Ibid*.

<sup>25</sup> *U. S. v. Lytle*, 5 McLean, 9; and see *Westbrook v. Miller*, *supra*.

<sup>26</sup> *Hahn v. U. S.*, 14 Ct. of Cl. 305; *aff'd*, 107 U. S. 402.

<sup>27</sup> *Union Ins. Co. v. Hoge*, *supra*.

<sup>28</sup> *U. S. v. Graham*, 110 U. S. 219.

<sup>29</sup> *U. S. v. Johnston*, 124 U. S. 31 L. ed. 389.

<sup>30</sup> *U. S. v. Macdaniel*, 7 Pet. 1, 14; *U. S. v. Dickson*, 15 Id. 141; *Greely v. Thompson*, 10 How. 225; *U. S. v. Graham*, *supra*; *Re Manhattan Ins. Inst'n*, 82 N. Y. 142.

to the body of the enactment."<sup>81</sup> Still less, where a rule of construction has been thus established as to one statute, but its application to a later one forbidden by the Legislature, will the court enforce its application to a yet more recent statute of the same class, if denied by the department."<sup>82</sup>

§ 361. **Limits of Effect of Contemporaneous and Practical Construction.**—The understanding which is accepted as authoritative on such questions, however, is not that which has been speculative merely, or floating in the minds of professional men; it must have been acted on, and acted on in general practice (*a*), and publicly. A mere general practice, for instance, which had grown up in a long series of years, on the part of the officers of the crown, of not using patented inventions without remuneration to the patentee, under the impression that the Crown was precluded from using them without his license, was held ineffectual to control the true construction or true state of the law; which was that the Crown was not excluded from their use (*b*). [Nor can a custom at variance with the plain meaning of the law be sustained as a construction of it. Thus, an acceptance given by the secretary of war to contractors upon whose contract no payment was due, was held void, either as an advance upon the contract or as a loan of the public credit, both of which were prohibited by act of congress, notwithstanding such a usage had sprung up in the department."<sup>83</sup> So, where the compensation of a public officer is fixed by local statute, he cannot recover additional compensation for expenses incurred by him in the performance of his official duties, although by a usage, long antedating the statute, such incidental expenses may have been paid without objection;"<sup>84</sup> for, whilst an immemorial custom may control the common law,"<sup>85</sup> both the latter and the custom, however venerable,

<sup>81</sup> *Dollar Sav. B'k v. U. S.*, 19 Wall. 227.

<sup>82</sup> *U. S. v. Gilmore*, 8 Wall. 330.

<sup>a</sup>) *Per* Lord Ellenborough in *Isherwood v. Oldknow*, 3 M. & S. 396; *per* Lord Cottenham in the *Waterford Peerage*, 6 Cl. & F. 173; *per* James, L. J., in *Re Ford*, 10

Ch. D. 370.

(*b*) *Feather v. R.*, 6 B. & S. 257, 35 L. J. 200.

<sup>83</sup> *Peirce v. U. S.*, 1 Ct. of Cl. 270.

<sup>84</sup> *Albright v. Bedford Co.*, 106 Pa. St. 532.

<sup>85</sup> *Delaplane v. Crenshaw*, 15 Gratt. (Va.) 457.

must yield to positive enactment.<sup>86</sup> Yet, where the authorized publication of territorial laws, framed by commissioners under an act of Congress, contained a saving, in the statute of limitations, as to persons beyond seas, which was retained in successive revisions under territorial and state authority, and acquiesced in by the people and the courts for a period exceeding 30 years, it was held, that, although as adopted by the Commissioners, the statute contained no such saving, the words expressing it having been erased in the original manuscript, it must nevertheless be taken to be a part of the law.<sup>87</sup> And similarly, where the statute roll of a municipal charter gave the town a right to impose a fine of \$90 for certain offences against ordinances, but the printed statutes, for years, printed \$20, it was held, in an action to recover the penalty, that the printed statutes must govern.<sup>88</sup>

§ 362. **Particular Customs.**—An universal law cannot receive different interpretations in different towns (*a*). A mere local usage cannot be invoked to construe a general enactment, even for the locality (*b*). A fortiori is this the case, when the local custom is manifestly at variance with the object of the Act; as, for instance, a custom for departing from the standard of weights and measures, which the Legislature plainly desires to make obligatory on all and everywhere (*c*). [The same is true as to customs in particular businesses. Thus, an act that “twenty hundreds make one ton,” cannot be controlled by a custom in a particular business making 2240 pounds a ton.<sup>89</sup> Nor can it be shown that the Legislature, in passing an act inconsistent with a custom, and sufficient in itself without the same, and silent as to it, knew of the existence of the custom, with a view to an

<sup>86</sup> Ibid.; Albright v. Bedford Co., supra.

<sup>87</sup> Pease v. Peck, 18 How. 595.

<sup>88</sup> Pacific v. Seifert, 79 Mo. 210. The syllabus of the decision styles this an “exceptional case.”

(*a*) Per Grose, J., in R. v. Hogg, 1 T. R. 728.

(*b*) R. v. Saltren, Cald. 444.

[Paull v. Lewis, 4 Watts. (Pa.) 402; Evans v. Myers, 25 Pa. St. 114; Ham v. Sawyer, 38 Me. 37.]

(*c*) Noble v. Durell, 3 T. R. 271.

<sup>89</sup> Godcharles v. Wigeman, 118 Pa. St. 431. For caution as to the adoption of usages among merchants, as rules of law, see Lanfear v. Blossman, 1 La. An. 154.

inference that the Legislature, by such silence, intended to sanction it."

§ 363. **Stare Decisis.**—[Upon the weight of usage and contemporaneous construction, sanctioned by the highest authority, rests, at least in part, the maxim of stare decisis as applied to the interpretation of statutes. "When doubtful words have received the same interpretation in a succession of cases, and the Legislature, which is presumed to know of such decisions, has not expressed its dissent by a declaration of the law or other positive enactment, the courts will consider themselves bound to adopt that meaning." As has been seen, the judicial interpretation of a statute becomes a part of the statute law, and a change of it is, in practical effect, the same as a change of the statute. Where, therefore, a decision, or a series of decisions, has become a rule of property, it is evident that justice and reason require it to be adhered to, so long as the statute upon which it is based remains unchanged." But even in other matters of statutory interpretation, not involving any fundamental principles or rules of property, but questions of practice, the same principle applies, although the decisions under which a practice has grown up be, in truth, erroneous." Upon this subject, however, a recent decision of the Supreme Court of Pennsylvania seems to lay down the only safe and reasonable rule. "Where a rule of property has been established, it is better to let it stand, although subsequent experience should satisfy us that it is an erroneous one. A rule of property can only

<sup>40</sup> *Delaplane v. Crenshaw*, 15 Gratt. (Va.) 457.

<sup>41</sup> *Wilb.*, p. 147. See, *Bish., Wr. L.*, § 104a.

<sup>42</sup> *Ante*, § 1, note 1.

<sup>43</sup> *Field v. Goldsby*, 28 Ala. 218; *Matheson v. Hearin*, 29 Id. 210; *Boon v. Bowers*, 30 Miss. 246; *Tuttle v. Griffin*, 64 Iowa, 455; *Hering v. Chambers*, 103 Pa. St. 172, 176; *Seale v. Mitchell*, 5 Cal. 401; *Aicard v. Daly*, 7 La. An. 612; *State v. Thompson*, 10 Id. 122; *Farmer v. Fletcher*, 11 Id. 142; *New Orleans v. Poutz*, 14 Id. 853; *Bane v. Wick*, 6 Ohio St. 13; *Day v. Munson*, 14 Id. 488. And, see *Bish., Wr. L.*, § 104a, citing,

in addition to some of the above cases: *Re Warfield*, 22 Cal. 51.

<sup>44</sup> *Lauve's Succession*, 6 La. An. 529; *Wolf v. Lowry*, 10 Id. 272; *Desplain v. Crow*, 14 Oreg. 404; *Sheridan v. Salem*, Id. 328. "A single decision should be followed, unless clearly wrong. And a series of decisions not just in themselves may bind where one would not." *Bish., Wr. L.*, § 104a, referring to *Com'th v. Miller*, 5 Dana (Ky.) 320; *R. v. Chantrell*, L. R. 10 Q. B. 587, 589, 590; *People v. Albertson*, 55 N. Y. 50, 64; *Van Loon v. Lyon*, 4 Daly (N. Y.) 149; *Kentucky v. Ohio*, 24 How. 66.



be changed by an act of assembly without unsettling titles;" but, upon a matter not involving a rule of property, "it is far better, when this court commits a blunder, to correct it in a manly way, than to imitate the ostrich by hiding our heads in the sand."<sup>45</sup> And it must also be remembered that such expressions as amount only to obiter dicta, do not control, but are controlled by the circumstances of the cases in which they occur and the points really in controversy.<sup>46</sup>

§ 364. **Federal and State Courts.** Courts of different States.—[A similar principle is probably the logical foundation of the rule in the federal courts, which adopts, upon the construction of state and foreign statutes, the decisions of the highest tribunals of the state or country where they are in force, except, as to states, in so far as they conflict with the constitution, laws and treaties of the United States;<sup>47</sup> and of the rule observed by the courts of the several states, by which the courts of one state, in construing the statutes of another, follow the decisions of the courts of the latter,<sup>48</sup> although a similar statute in the home state has received a

<sup>45</sup> Paxson, J., in *York's App.*, 17 W. N. C. (Pa.) 33; 1 Centr. Rep. 659, 660; *S. C.* 110 Pa. St. 69.  
<sup>46</sup> *Miller v. Marigny*, 10 La. An. 338.

<sup>47</sup> See *Bell v. Morrison*, 1 Pet. 351; *DeWolf v. Rabaud*, Id. 476; *Gardiner v. Collins*, 2 Id. 58; *U. S. v. Morrison*, 4 Id. 124; *Cathcart v. Robinson*, 5 Pet. 264; *Happending v. Dutch Church*, 16 Id. 455; *Elmendorf v. Taylor*, 10 Wheat. 152; *Porterfield v. Clark*, 2 How. 76; *Curran v. Arkansas*, 15 How. 304; *Peik v. Ry. Co.*, 94 U. S. 164; *Lamborn v. Dickinson Co.*, 97 U. S. 181; *Davie v. Briggs*, Id. 628; *R. R. Companies v. Gaines*, Id. 697; *Amy v. Dubuque*, 98 Id. 470; *Amer. Emigr. Co. v. Adams Co.*, 100 Id. 61; *Barrett v. Holmes*, 102 Id. 651; *Moores v. Bank*, 104 Id. 625; *Flash v. Conn*, 109 Id. 371; *Boyle v. Arlidge*, Hemps. 620; *The Samuel Strong*, Newb. Adm. 187; *Bloodgood v. Gracey*, 31 Ala. 575; *Black v. Canal Co.*, 22 N. J. L. 130; *Draper v. Emerson*, 22 Wis. 147;

*State v. Macon Co. Ct.*, 41 Mo. 453. But see, for exceptions to this rule: *Morgan v. Curtenius*, 20 How. 1; *Hooper v. Scheimer*, 23 Id. 235; *Butz v. Muscatine*, 8 Wall. 575.

<sup>48</sup> See *Hoyt v. Thompson*, 3 Sandf. (N. Y.) 416; *Howe v. Welch*, 3 How. Pr. N. S. (N. Y.) 465; *Hale v. Lawrence*, 23 N. J. L. 590; *Sparrow v. Kohn*, (Pa.) 1 Centr. Rep. 352; *Davis v. Robertson*, 11 La. An. 752; *McMerty v. Morrison*, 62 Mo. 140; *Johnston v. Bank*, 3 Strobb. Eq. (S. C.) 263; *Carlton v. Felder*, 6 Rich. Eq. (S. C.) 58. So, too, as to the construction of a charter granted by another state: *Merrimac Min'g Co. v. Levy*, 54 Pa. 3t. 227; *Aultman's App.*, 98 Id. 505. Accordingly, the construction put by the U. S. Supreme Court upon an act of Congress will be adopted by state courts; *State v. Andriana*, (Mo.) 10 West. Rep. 35, holding § 4, Act 1802, concerning infants of naturalized citizens, both prospective and retrospective.

different construction :“ this rule being, however, subject to the qualifications, that the decision of the Supreme Court of the United States upon such foreign statute, differing from the construction put upon it by the courts of its own state, and being more in harmony with the jurisprudence of the state whose court is called upon to construe the act, will, in general, be preferred ;” and that, in the absence of any proof of the construction given to a statute of another state by its courts, the court in which the question is raised will construe it as it would a statute of its own state.”

§ 365. **Legislative Declaration of Construction. Later Cognate Acts.**—[A construction put upon an act by the Legislature itself, by means of a provision embodied in the same, that it shall or shall not be construed in a certain designated manner, is binding upon the courts, although the latter, without such a direction, would have understood the language to mean something different.” Thus, where an act made the secretion, sale, incumbrance, or fraudulent disposition of property, not offences by themselves, but declared them to be “a fraudulent transfer of property,” the court said : “This definition is furnished by the act itself, and the definition is as much a part of the act as any other portion. The right of the Legislature to prescribe the legal definitions of its own language must be conceded.”” Moreover, a

<sup>49</sup> *Howe v. Welch*, 17 Abb. N. C. (N. Y.) 397.

<sup>50</sup> *Davis v. Robertson*, 11 La. An. 752; especially when the matter is reviewable by the federal courts : *Ibid.*

<sup>51</sup> See *Bond v. Appleton*, 8 Mass. 472; *Smith v. Robertson*, 11 Ohio St. 690. See *Anderson v. May*, 10 Heisk. (Tenn.) 84, where, an Arkansas statute being the same as a New York act, the court in Tennessee gave the former the construction given by the New York courts to the latter. See post, § 371.

<sup>52</sup> *Smith v. State*, 28 Ind. 321. See, also, *U. S. v. Gilmore*, 8 Wall. 380; *Phila., etc., R. R. Co. v. Catawissa R. R. Co.*, 53 Pa. St. 20; *Byrd v. State*, 57 Miss. 243. See *Jones v. Surprise*, (N. H.) 4

*New Engl. Rep.* 292, 294, where it is said : “The construction of statutes is governed by legislative definitions : that of indictments by the ordinary use of language ;” cit. *State v. Adams*, 51 N. H. 568; *State v. Canterbury*, 28 Id. 195.

<sup>53</sup> *Herold v. State*, 21 Neb. 50, 52-53. See the discussion of interpretation clauses in *Wilb.*, pp. 296-300, where it is remarked : “It has been said that a very strict construction should be placed upon a section which declares that one thing shall mean another (cit. *Allsop v. Day*, 7 H. & N. at p. 463, *per Pollock, C. B.*), that interpretation clauses embarrass rather than assist the courts in their decisions (cit. *R. v. Cambridge-shire, Justices*, 7 A. & E. at p. 491, *per Lord Denman, C. J.*), and fre-

statute declaratory of a former one has the same effect upon the construction of such former act, in the absence of intervening rights, as if the declaratory act had been embodied in the original act at the time of its passage.<sup>64</sup> And] when the Legislature puts a construction on an Act, a subsequent cognate enactment in the same terms would, *prima facie*, be understood in the same sense. Thus, as the 125th section of the Bankrupt Act of 6 Geo. 4, which made void securities given by a bankrupt to creditors, as a consideration for signing the bankrupt's certificate, was stated in the preamble of the 5 & 6 Will. 4, c. 41, to have had the effect of making such securities void even in the hands of innocent holders for

quently do a great deal of harm by giving a non-natural sense to words which are afterwards used in a natural sense without the distinction being noticed" (cit. *Lindsey v. Cundy*, L. R. 1 Q. B. D. at p. 358; *per Blackburn, J.*). See also, the observations there referred to, of Lord St. Leonards, L. C., in *Dean of Ely v. Bliss*, 2 DeG. M. & G. at p. 471; *Wood, V. C.*, in *Midland Rail. Co. v. Ambergate Rail. Co.*, 10 Hare, at pp. 369, 370; *Lush, J.*, in *R. v. Pearce*, L. R. 5 Q. B. D. at p. 389. It seems, accordingly, to be the rule in England, that an interpretation is not to receive a construction which would give it the effect of substituting one set of words for another or rigidly defining the meaning of a word under all circumstances, but merely of declaring what things or persons may be comprehended within a particular term where the circumstances require that they should: see *R. v. Cambridgeshire, Justices*, *supra*. And in some cases a narrower, in others a more extended meaning has been given to words than a literal compliance with the interpretation clause would seem to warrant: see as examples of the first class, *Grant v. Ellis*, 9 M. & W. 113; *Dean of Ely v. Bliss*, 2 DeG., M. & G. 459; of the second, *Davis v. R. R. Co.*, 2 L. M. & P. 599. Similarly a declaration that a certain word, etc., "shall include" certain things has been held to be used "by way

of extension, and not as giving a definition by which other things are to be excluded." *Wilb.*, p. 299, cit. *R. v. Kershaw*, 6 E. & B. at p. 1007; 26 L. J. M. C. at p. 23, *per Erle, J.*; *Exp. Ferguson*, L. R. 6, Q. B. 280, 291; as *e. g.*, where "it was declared that 'petroleum' should include all such rock oil, etc., as gave off an inflammable vapor at a temperature of less than 100 degrees, Fahrenheit . . . petroleum itself was held to be within the Act, even if it did not give off an inflammable vapor below the specified temperature," cit. *Jones v. Cook*, L. R. 6 Q. B. 505. Again: "It does not follow that because the expression 'new street' is to include certain other things, we are to say it does not include its own natural meaning;" *Blackburn, J.*, in *Pound v. Plumstead B'd of Works*, L. R. 7 Q. B. at p. 194. See, also, *Nutter v. Accrington Local Board*, L. R. 4 Q. B. D. 375; *Worsley v. R. R. Co.*, 16 Q. B. 539. *Comp. State v. Dillon*, 87 Mo. 487, where, although § 3126 of the Mo. Rev. Stat. provides that the word "county" in any general law shall include the city of St. Louis, it was held that the statutes of that state had not provided for a contest in the courts of the right to the office of mayor of that city.

<sup>64</sup> *State v. Sold. & Sail. Orph. Home*, 37 Ohio St. 275; *Comp. Hankins v. People*, 106 Ill. 628. ante, § 329, note.

value, and was modified so as to make them valid in such hands; it was considered, when the Act of Geo. 4 was repealed, and its 125th section was re-enacted in its original terms in the Bankrupt Act of 1849, that the renewed enactment ought to receive the construction which the preamble of the 5 & 6 Will. 4 had put on the earlier one (a). The expression "taxed cart," in a recent local Act, was held to mean a vehicle which had been defined as a taxed cart by the 43 Geo. 3, c. 161 (b). [Where an act had authorized the enlargement of a market house by a municipal corporation, on condition that the stalls in the western moiety thereof be left free to the country people; and another subsequent act recited that the intentions of the Legislature were likely to be frustrated by the intrusion of persons of a different description from those intended to be provided for by the preceding act, and declared that it should not be lawful for any person whatever to sell any beef in the western moiety of the market house; and a still later act authorized a further extension of the market house, again reserving the western moiety for country people, and allowing them to sell their produce there, it was held, that, as beef had been before excluded by the Legislature, as without the legislative intention, the sale of it was not included in the power, under the later act, to market the produce of farms, in the western moiety, although in the broadest sense, beef might be regarded as a product thereof.<sup>55</sup> But, of course, if the later statute shows a distinct intention inconsistent with a previously declared rule of construction, the latter becomes inapplicable.<sup>56</sup> "The intention of the Legislature, when discovered, must prevail, any rule of construction declared by previous acts to the contrary notwithstanding."<sup>57</sup>]

§ 366. **Earlier Cognate Acts.**—Where it is gathered from a later Act, that the Legislature attached a certain meaning to an earlier cognate one, this would be taken as a legislative

(a) *Goldsmid v. Hampton*, 5 C. B. N. S. 94, 27 L. J. 286.

(b) *Williams v. Lear*, L. R. 7 Q. B. 285, overruling *Purdy v. Smith*, E. & E. 511. See *Ward v. Beck*, 31 C. B. N. S. 668, 32 L. J. 113.

<sup>55</sup> *Mayor of Philad'a v. Davis*, 6 Watts & S. (Pa.) 269.

<sup>56</sup> *Brown v. Barry*, 3 Dall. 365.

<sup>57</sup> *Per Ellsworth*, C. J., *Ibid.*, at p. 367.

declaration of its meaning there (a). [To this principle would seem most properly referable the decision already mentioned," that, where a statute declared that the burden of showing irregularities in sales made under a certain enactment should be upon the party assailing their validity, the same principle was held to apply to sales made under an earlier enactment of similar purport."<sup>59</sup>

§ 367. **Use of Same Phraseology in Later Acts in *Pari Materia*.**—[The importance, in the construction of a statute, of a comparison of the same with earlier statutes in *pari materia*, has already been pointed out."<sup>60</sup> A recourse to such statutes, however, necessarily involves a recourse to the construction placed upon them by the courts; for such decisions become virtually a part of the law,"<sup>61</sup> and, aside from this consideration, as the comparison of former acts in *pari materia* proceeds upon, and is justified and demanded by, the principle that the Legislature cannot be presumed ignorant of previous legislation,"<sup>62</sup> so a recourse to the construction put by the courts upon words used in such acts, is based upon the reasonable assumption, that, where the Legislature has reproduced language upon which a case has been decided, it must have known the interpretation put upon them in that decision."<sup>63</sup> It is but a corollary to this assumption, that, where cases have been decided on particular forms of words in courts of justice, and those forms of words are then used in legislative enactments, the Legislature, in the absence of anything in the statutes showing that it did not mean to use them in the sense attributed to them by such judicial construction, must be presumed to have used them in that sense."<sup>64</sup>] It may be

(a) *R. v. Smith*, 4 T. R. 419; *Morris v. Mellin*, 6 B. & C. 454. [And see *State v. Ohio Sold. & Sail. Orph. Home*, 37 Ohio St. 275.]

<sup>59</sup> Ante, § 327.

<sup>60</sup> *Chandler v. Northrop*, 24 Barb. (N. Y.) 129. See, also, ante, § 354.

<sup>61</sup> Ante, §§ 43 et seq.

<sup>62</sup> See ante, §§ 1, note 1; 358, 363.

<sup>63</sup> *Howard Ass'n's App.*, 70 Pa. St. 344, 346; ante, § 182.

<sup>64</sup> *Clark v. Wallond*, 52 L. J. Q. B. D. 322, *per Mathew, J.*; *O'Byrnes v. State*, 51 Ala. 25; *Cota v. Ross*, 66 Me. 161.

<sup>64</sup> *Barlow v. Teal*, L. R. 15 Q. B. D. 403, *per Coleridge, C. J.* See to same effect: *The Abbotsford*, 98 U. S. 440; *Com'th v. Hartnett*, 3 Gray (Mass.) 450; *Exp. Banks*, 28 Ala. 28; *Bloodgood v. Grasey*, 31 Id. 575; *Tuxbury's App.*, 67 Me. 267; *Whitcomb v. Rood*, 20 Vt. 49; *Frink v. Pond*, 46 N. H. 125; *McKee v. McKee*, 17 Md. 352;

taken for granted that the Legislature is acquainted with any construction which has been put on a statute by judicial authority—[“not only the general principles of law, but the construction which the courts have put upon particular statutes.”<sup>65</sup>] Therefore, when the words of an old statute are either transcribed into, or by reference made part of a new statute, this is understood to be done with the object of adopting any legal interpretation which has been put on them by the Courts (a). So, the same words appearing in a subsequent Act in *pari materia*, the presumption arises that they are used in the meaning which had been judicially put on them, and unless there be something to rebut that presumption, the new statute is to be construed as the old one was (b). One reason, for instance, for holding that the 534th sect. of the Merchant Shipping Act of 1854, which limits the liability of ship-owners, did not extend to foreign ships, was that the enactment was taken from 53 Geo. 3, c. 159, which had received that construction judicially (c). On similar grounds, Order 31 of the Judicature Act, 1875, r. 11, received the same construction as had been given to the earlier enactment from which it was copied (d). [So, the expression, in the insolvent acts of Massachusetts, “founded on a contract made,” in defining the powers of the court over the debt, is said to be always construed as referring to the contract upon which the debt, for the time being, rests; whilst the phrase “debt contracted” refers to the origin of the liability.” And the words “every dollar of the value thereof,” having, as applied to the assessment, for purposes of taxation, of corporation stock, etc., under the various revenue laws of the state of Pennsylvania, judicially acquired a definite and well-settled

County Seat of Linn Co., 15 Kan. 500; and cases in preceding note and *infra*.

<sup>65</sup> Wilb., p. 16.

(a) *Per* James, L. J., in Dale's Case, 6 Q. B. D. 453.

(b) Mansell v. R., 8 E. & B. 73, *per* Blackburn, J., in Jones v. Mersey Dock Co., 11 H. L. 480; Exp. Thorne, 3 Ch. D. 458, Exp. Attwater, 5 Ch. D. 30, and *per* James, L. J., in Exp. Campbell, 5 Ch. D. 706. Comp. the remarks

of Byles, J., in St. Losky v. Green, 9 C. B. N. S. 370, 80 L. J. 21; and see ex. gr. Sturgis v. Darrell, 4 H. & N. 622, 28 L. J. 366, *sup.* § 326.

(c) *Per* Turner, L. J., in Cope v. Doherty, 4 K. & J. 27 L. J. Ch. 616.

(d) Bustros v. White, 1 Q. B. D. 428.

<sup>66</sup> Wyman v. Fabens, 111 Mass. 77, 82.

meaning, as referring to the actual, not the mere nominal, value thereof, was so construed when occurring in the general revenue law of 1881.<sup>67</sup>

§ 368. **Adoption of Previous Construction by Re-enactment.**— [Where, indeed, the two acts in *pari materia* are almost precisely alike, in the provisions under construction, it is said that the decisions upon the earlier will be considered as authority in the interpretation of the later act.<sup>68</sup> In other words, the re-enactment of a statute which has received a judicial construction, in the same, or substantially the same, terms, amounts to a legislative adoption of such construction, whether such re-enactment is by way of an isolated and independent statute, of the incorporation of several former statutes into one, or of their incorporation in a code or revision of statutes.<sup>69</sup> That is to say, it is a legislative adoption of its known construction; so that that judicial construction which has been reported is to be deemed to have been adopted, notwithstanding there may have been other judicial expositions, differing from the same, but remaining unreported at the date of the new enactment.<sup>70</sup>

<sup>67</sup> *Com'th v. R. R. Co.*, 104 Pa. St. 89. And where the effect of a particular form of repealing clause had been several times adjudicated to be a continuation of the provisions of the older statutes, it was said that the use of it again by the Legislature was to be treated as an adoption of that effect; the decisions of the Supreme Court being matters of record and publication: *State v. Brewer*, 22 La. An. 273.

<sup>68</sup> *Evans v. Ross*, 107 Pa. St. 231.

<sup>69</sup> See *Duramus v. Harrison*, 26 Ala. 326; *Anthony v. State*, 29 Id. 27; *Bank of Mobile v. Meagher*, 33 Id. 622; *O'Byrnes v. State*, 51 Id. 25; *Exp. Matthews*, 52 Id. 51; *Woolsey v. Cade*, 54 Id. 878; *Re Murphy*, 23 N. J. L. 180; *Knight v. Ocean Co.*, (N. J.) 10 Centr. Rep. 653. *La Selle v. Whitfield*, 12 La. An. 81; *Myrick v. Hasey*, 27 Me. 9; *Cota v. Ross*, 66 Id. 161; *Tuxbury's App.*, 67 Id. 267; *State v. Swope*, 7 Ind. 91; *Gould v. Wise*,

18 Nev. 253; *McKenzie v. State*, 11 Ark. 594. And see *State v. Stockley*, (O.) 11 West. Rep. 259, where, upon the principle that, in a revision of all the general statutes of a state, a particular statute will receive the same construction as before the revision, it was held that a provision of the Rev. Stat. that directors "shall be chosen by ballot by the stockholders who attend for that purpose . . . each share shall entitle the owner to as many votes as there are directors to be elected, and a plurality of votes shall be necessary for a choice," did not give the right of cumulative voting. That, however, if the language of a section of a revision is unambiguous, the court will not, in determining its meaning, consider the language of the statutes of which it is a revision, see *Bent v. Hubbardston*, 138 Mass. 99. *Aliter*, if ambiguous: *Pratt v. Comm'rs*, 139 Id. 559.

<sup>70</sup> *Hakes v. Peck*, 30 How. Pr. (N. Y.) 104.

§ 369. **Same Phraseology in Analogous Acts.**—[But the rule is not confined to statutes strictly in *pari materia*. Where terms and modes of expression are employed in a new statute, which, at the time of its enactment, had acquired, by judicial construction, a definite meaning and application in a previous statute on the same subject, or on one analogous to it, they are generally supposed to be used in the same sense, and in the construction of the later act, regard should be had to the known and established interpretation of such terms and modes of expression in the former." Thus, an act passed in 1803 provided that no courts could be appointed to be holden before a justice for the trial of civil causes at an earlier hour than 9 A.M. nor at a later than 6 P.M., nor any default be taken until two hours after "the time set for trial." It was held that this phrase meant the time set for trial in the original process, and had no reference to any time set or appointed by adjournment." In 1832 an act was passed, that, when any civil process should be served, returnable before a justice, and, "at the time appointed for the trial," the justice should be unable to attend, another justice might continue the suit. It was held that the same construction must be given to this substantial repetition of the phrase contained and construed in the earlier act." And, of course, when subsequently the Revised Statutes provided, that, whenever "at the time and place appointed for the trial" of any civil suit before a justice, the latter should be unable to attend, another justice might grant a continuance, the same interpretation was put upon this expression;" and no efficacy to change this interpretation was allowed to a restriction in both of the latter acts forbidding more than one continuance, except by the justice before whom the case was to be tried."

§ 370. **Amendments using Same Terms.**—[It is scarcely necessary to remark, that, where the same language, which has received a certain judicial construction in an act, is used in an act amendatory of the same, it is to be presumed to have

<sup>71</sup> Whitcomb v. Rood, 20 Vt.  
49.

<sup>72</sup> Steele v. Bates, 2 Vt. 320.

<sup>73</sup> Phelps v. Wood, 9 Vt. 399.

<sup>74</sup> Whitcomb v. Rood, *supra*.

<sup>75</sup> *Ibid*.



been used there in the same sense, and intended to be subject to the same construction." Amendments are so much regarded as but parts of the enactment affected by them," that it would seem that the rule that a word, etc., repeatedly used in the same statute is, in the absence of a manifest intent to the contrary, to receive the same meaning throughout" must apply to them."

§ 371. **Adoption of Construction by Transcribing Foreign Act.**— [One of the most important bearings, possibly extensions, of the rule in question, is its application to statutes transcribed from the statute book of another state or nation. Thus it has been held, that, where Congress or the Legislature of a State enacts a statute which is a transcript of an English act that has received a known and settled construction by the courts of that country, that construction, at the time of such enactment, is to be deemed as accompanying and forming an integral party of the same."<sup>66</sup> And the same rule applies as to statutes copied from the statute books of other states."<sup>67</sup>

<sup>66</sup> *Gonder v. Estabrook*, 33 Pa. St. 374, 375. And see *Robbins v. R. R. Co.*, 32 Cal. 472.

<sup>67</sup> See ante, § 294.

<sup>68</sup> *Pitte v. Shipley*, 46 Cal. 154; ante, § 41. Comp. post, § 387.

<sup>69</sup> Compare, however, *State v. Co. Comm'rs*, 78 Me. 100; where the phrase "Regular sessions," in Rev. Stat. c. 78, § 6, was held not to be identical in meaning with the same words in Rev. Stat. c. 18, § 5, the words "terms of record" in the later act bearing that meaning.

<sup>70</sup> *Pennock v. Dialogue*, 2 Pet. 1; *Cathcart v. Robinson*, 5 Id. 265; *McDonald v. Hovey*, 110 U. S. 619; *Kirkpatrick v. Gibson*, 2 Brock. Marsh. 388; *The Devonshire*, 8 Sawyer, 209; *Tyler v. Tyler*, 19 Ill. 151; *Kennedy v. Kennedy*, 2 Ala. 571; *Marqueze v. Caldwell*, 48 Miss. 23; *State v. Robey*, 8 Nev. 312. See *Taylor v. Thompson*, 5 Pet. 358; *Com'th v. Hartnett*, 3 Gray (Mass.) 450; *Bloodgood v. Grasey*, 31 Ala. 575.

<sup>81</sup> *Com'th v. Hartnett*, supra; *Pratt v. Amer. Bell Tel. Co.*, 141 Mass. 225; *Campbell v. Quinlin*, 4

Ill. 288; *Rigg v. Wilton*, 13 Id. 15; *Fisher v. Deering*, 60 Id. 114; *Freese v. Tripp*, 70 Id. 496; *Pangborn v. Westlake*, 36 Iowa, 356; *Bloodgood v. Grasey*, 31 Ala. 575; *Drennan v. People*, 10 Mich. 169; *Harrison v. Sager*, 27 Id. 476; *Grenier v. Klein*, 28 Id. 12, 22; *Daniels v. Clegg*, Id. 32; *Draper v. Emerson*, 22 Wis. 147; *Poertner v. Russel*, 33 Id. 193; *Westcott v. Miller*, 42 Id. 454; *Kilkelly v. State*, 43 Id. 604; *State v. Macon Co.*, 41 Mo. 453; *Clark v. R. R. Co.*, 44 Ind. 248; *Fail v. Hazelrigg*, 45 Id. 576; *Trabant v. Rummell*, 14 Oreg. 17; *Snoddy v. Cage*, 5 Tex. 106; *Lindley v. Davis*, 6 Mont. 453; (where it is also decided that the adoption of a statute which has been amended, in the form in which it stood before the amendments were made, adopts the interpretation as made prior to the amendments). Compare *Hobbs v. R. R. Co.*, 9 Heisk. (Tenn.) 873; *Anderson v. May*, 10 Id. 84 (ante, § 364, note); *Re Swearingin*, 5 Sawyer, 52; *Hahn v. U. S.*, 14 Ct. of Cl. 305. In *Freese v. Tripp*, supra, in applying the rule stated in

Indeed, it is laid down, that, whether passed by the Legislature of the same state or country, or by that of another, the terms of a statute which have acquired a settled meaning by judicial construction, are, when used in a later one, to be understood in the sense so attributed to them.<sup>82</sup> But, as applied to transcribed statutes, this rule is undoubtedly subject to important qualifications. Whilst admitting that the construction put upon such statutes by the courts of the state from which they are borrowed is entitled to respectful consideration, and that only strong reasons will warrant a departure from it, its binding force has been wholly denied, and it has been asserted that a statute of the kind in question stands upon the same footing, and is subject to the same rules of interpretation as any other legislative enactment.<sup>83</sup> And it is manifest that the imported construction should prevail only in so far as it is in harmony with the spirit and policy of the general legislation of the home state,<sup>84</sup> and should not, if the language of the act is fairly susceptible of another interpretation, be permitted to antagonize other laws in force in the latter, or to conflict with its settled practice.<sup>85</sup> Nor, where the constitutional requirements of the adopting state are different from those of the originating one, would a construction by the courts of the latter conformable with its constitution, bind the courts of the former not similarly constrained.<sup>86</sup> And, of course, a construction by the courts of the originating state, declaring an act unconstitutional, as being repugnant to the federal constitution, is not one which must be deemed adopted with the statute, where the transcribed statute, though largely a copy of the foreign one, yet contains such differentiating elements as to permit a

the text to a statute giving an action for damages to the wife for selling liquor to the husband, it was held that mental anguish, disgrace, or loss of society was not an injury within the meaning of the act, and not a proper subject of consideration for the jury; but only injury in person, property or means of support (cit. *Mulford v. Clewell*, 21 Ohio St. 191); and that plaintiff

must prove actual injury (cit. *Schreider v. Hosier*, Ib. 93.)

<sup>82</sup> *Com'th v. Hartnett*, supra; *Bloodgood v. Grasey*, 31 Ala. 575.

<sup>83</sup> *Ingraham v. Regan*, 23 Miss. 218.

<sup>84</sup> *Gage v. Smith*, 79 Id. 219, cit. *Rigg v. Wilton*, 13 Ill. 15, and *Streeter v. People*, 69 Id. 598; *Jamison v. Burton*, 43 Iowa, 282.

<sup>85</sup> *Cole v. People*, 84 Ill. 216.

<sup>86</sup> *Re Swearingin*, 5 Sawyer, 52

construction which will uphold it as constitutional." It is scarcely needful to add that subsequent fluctuations in the construction of a transcribed statute, by the courts of the originating state or country, though they may be entitled to great respect, are not within the meaning of the rule under discussion.<sup>87</sup>]

§ 372. **Effect of Legislative Intimation of Erroneous Opinion.**—But an Act of Parliament does not alter the law by merely betraying an erroneous opinion of it (*a*), [so as to make it accord with the misconception.] For instance, the 7 Jac. 1, c. 12, which enacted that shop books should not be evidence above a year before action, did not make them evidence within the year; though the enactment was obviously passed under the impression, not improbably confirmed by the practice of the Courts in those days, that they were admissible in evidence (*b*). [Nor does a declaration in a statute that husband and wife shall not be *required* to testify against each other make them competent to do so voluntarily.<sup>88</sup>] So, an Act of Ed. 6, continuing till the end of next session an Act of Hen. 8, which was not limited in duration, was considered to be idle in that respect, and not to abrogate it (*c*). A passage in an Act which showed that the Legislature assumed that a certain kind of beer might be lawfully sold without a license, could not be treated as an enactment that such beer might be so sold, when the law imposed a penalty on every unlicensed person who sold any beer (*d*). The 41 & 42 Vict. c. 77, s. 7, which provided that the Public Health Act of 1875, s. 149, which vests the "streets" of a town in its local authority, should not be construed to pass minerals to the local authority, was considered not to afford the inference that the soil and freehold of the streets vested in all other respects (*e*). Earlier bank-

<sup>87</sup> See *Haskell v. Jones*, 86 Pa. St. 173. T. R. 358.

<sup>88</sup> See *Cathcart v. Robinson*, 5 Pet. 264.

(*a*) See *ex. gr. per* Ashurst, J., in *Dore v. Gray*, 2 T. R. 358; *Exp. Lloyd*, 1 Sim. N. S. 248, *per* Shadwell, V. C.

(*b*) *Pitman v. Maddox*, 2 Salk. 690. See, also, *Dore v. Gray*, 2

*Byrd v. State*, 57 Miss. 243. (*c*) *The Prices of Wine*, Hob. 215. And see *Allen v. Flicker*, 10 A. & E. 640, ante, § 71.

(*d*) *Read v. Storey*, 6 H. & N. 423, 30 L. J. M. C. 110; see 24 & 25 Vict. c. 21, s. 3.

(*e*) *Coverdale v. Chorlton*, 4 Q. B. D. 116; *Rolls v. St. George*,

rupt Acts, in making traders having the privilege of Parliament liable to be made bankrupts, had expressly provided that they should be exempted from arrest; but when the Bankrupt Act of 1861 enacted that all debtors should be liable to bankruptcy, without making any similar provision on behalf of peers and members of Parliament, it was held that they were nevertheless protected by the privilege (a). [So, the fact that a statute is referred to in a subsequent one, the reference not being intended as a re-enactment, will not give it vitality." Even where the later act attempts to amend an earlier one, previously repealed by implication, the copying of parts of the earlier act into the amendment, was held not to re-enact it." Conversely, a recital in an act that a former statute was repealed or superseded by another, is not conclusive upon the question of its repeal, that being a judicial, not a legislative one." And where an act, declared to take effect at a future date, abolished the office of city marshall of Detroit, and another act, passed subsequently to it, but before the date fixed for its going into operation, reduced the number of jurors to be summoned by the marshall in certain proceedings, it was held that the latter enactment did not operate to repeal the former so as to continue the office of city marshall." In some states the principle has been made a statutory rule of construction, that the repeal of an act is not to be deemed a declaration that any act or part of an act expressly or impliedly so repealed was previously in force."]

Southwark, 14 Ch. D. 785, 49 L. J. 691. See *Brunton v. Griffiths*, 1 C. P. D. 355, *per Brett*, L. J.

(a) *Newcastle v. Morris*, L. R. 4 H. L. 661.

<sup>90</sup> *South Ottawa v. Perkins*, 94 U. S. 260.

<sup>91</sup> *Stingel v. Nevel*, 9 Oreg. 62. But, where an act passed in 1839, contained certain provisions on a subject, and another was passed upon the same subject in 1857, and finally, in 1867, still another act made other provisions "in addition to" those contained in the act of 1839, it was held, that, if the latter was repealed by the act of 1857, it was revived by that of

1867: *People v. Miner*, 46 Ill. 367.

<sup>92</sup> *U. S. v. Claffin*, 97 U. S. 546. And see *Trask v. Green*, 9 Mich. 358. But see *Penna. Co. v. Dunlap*, (Ind.) 11 West Rep. 87, that the Legislature may declare that former acts shall not be deemed repealed by later ones, and that such a declaration will be carried into effect whenever it can be done without destroying the later act. And see *People v. Jaehne*, 103 N. Y. 182, *ante*, § 193.

<sup>93</sup> *People v. Mahaney*, 13 Mich. 481.

<sup>94</sup> *Stimson*, Amer. Stat. Law, p. 143, § 1043; *i. e.*, in New York, Wisconsin and California.

§ 373. In the case of the *Franconia* (*a*), the majority of the judges held that the Criminal Courts of this country had no jurisdiction to try a foreigner for manslaughter committed while he was sailing in a foreign ship within three miles from the coast of England ; although several Acts of Parliament had assumed jurisdiction, for the purposes of navigation, revenue, and fisheries (*b*), over foreigners for acts done within the three mile zone ; and one Statute (*c*) had declared that the minerals below low-water mark (in Cornwall) belonged to the Crown. [So, where an act has expressly excepted certain cases from the jurisdiction of a court, the latter is not extended to such cases by expressions in a subsequent enactment indicating a belief on the part of the Legislature that the jurisdiction of the court embraces them." And it is said that the jurisdiction of a magistrate can never be inferred from the mere fact that a statute, by its phraseology, implies that his jurisdiction extends to a particular case."

§ 374. **Effect of Express Enactment of Existing Rules.**—[It is an obvious inference from what has gone before, that enactments of any specific provision on a particular subject are not to be regarded as conclusive declarations that the law was different before." Thus, a statutory provision empowering towns at their annual meetings to grant taxes on the assessment list which should next thereafter be completed by the assessors, was held to be no proof that they had not that power before." So, where an act permitting the extension of a market house provided that one half of the same should be let to country people and the other half to butchers, victuallers, etc., "any law, usage or custom to the contrary notwithstanding," the former act which had also required the setting aside of the one-half for country people, and had

(*a*) *R. v. Keyn*, 2 Ex. D. 163.

(*b*) 59 Geo. 3, c. 38, s. 2; 17 & 18 Vict. c. 104, s. 527; 33 & 34 Vict. c. 90, s. 52; 39 & 40 Vict. c. 36, ss. 179, 235 (Hovering.)

(*c*) 21 & 22 Vict. c. 109. The three mile zone, too, is, in international law, so far considered a part of the adjoining land, that

capture within it is bad.

<sup>55</sup> *Ludington v. U. S.*, 15 Ct. of Cl. 453.

<sup>56</sup> *Hersom's Case*, 39 Me. 476. See *State v. Miller*, 23 Wis. 634, post, § 377.

<sup>57</sup> *Montville v. Haughton*, 7 Conn. 543.

<sup>58</sup> *Ibid.*

prohibited the sale of beef therein, was held not repealed, as to the latter provision, there being no law, usage, or custom to the contrary; so that, under the later act, the selling of beef in the part set aside for the country people, even by such, remained prohibited.<sup>99</sup> Nor is an express declaration, in a code, of a rule of law or equity, any indication that the rule was otherwise before.<sup>100</sup> The application of this principle is all the more obvious in the case of] provisions sometimes found in Statutes enacting imperfectly or for particular cases only that which was already and more widely the law. [Such enactments] have occasionally furnished ground for the contention that an intention to alter the general law was to be inferred from the partial or limited enactment; resting on the maxim, *expressio unius est exclusio alterius*. But that maxim is inapplicable in such cases.<sup>101</sup> The only inference which a Court can draw from such superfluous provisions (which generally find a place in Acts to meet unfounded objections and idle doubts), is that the Legislature was either ignorant or unmindful of the real state of the law, or that it acted under the influence of excessive caution; and if the law be different from what the Legislature supposed it to be, the implication arising from the Statute, it has been said, cannot operate as a negation of its existence (*a*); and any legislation founded on such a mistake has not the effect of making that law which the Legislature erroneously assumed to be so. Thus, when in contending that debts due by corporate bodies were subject to foreign attachment in the Mayor's Court, the express statutory exemptions of the East India Company and of the Bank of England were relied upon as supplying the inference that corporate bodies were deemed by the Legislature to be subject to that process, the judicial answer was that it was more reasonable to hold that the two great corporations prevailed on Parliament to prevent all questions as to themselves by direct enactment, than to hold that Parliament by such special enactment meant to deter-

<sup>99</sup> *Mayor of Philad'a v. Davis*, 6 Watts & S. (Pa.) 259, 278.

<sup>100</sup> *Nunally v. White*, 3 Metc. (Ky.) 584.

<sup>101</sup> See, as to proper meaning and application of this maxim, post, §§

397-399.

(a) *Per Cur.* in *Mollwo v. Court of Wards*, L. R. 4 C. P. 419, 437; and see *per Cockburn, C. J.*, in *Shrewsbury v. Scott*, 6 C. B. N. S. 1, 29 L. J. 53.

mine the question in all other cases adversely to corporations (a). A local Act which, in imposing wharfage dues for the maintenance of a harbor on certain articles, expressly exempted the Crown from liability in respect of coals imported for the use of royal packets; and the provisions in turnpike Acts (b), which exempted from toll carriages and horses attending the Queen, or going or returning from such attendance; were not suffered to affect the more extensive exemptions which the Crown enjoys by virtue of its prerogative (c). [So, an express declaration that persons interested in the recovery of a penalty may be witnesses does not operate as a repeal of an earlier act authorizing parties to proceedings generally to be so.<sup>102</sup> Nor would a statute amendatory of another and giving a right of appeal in certain cases be construed as showing that the right did not exist before;<sup>103</sup> nor an affirmative statute authorizing a court to permit a guardian to sell, etc., that he had no right to sell without such permission.<sup>104</sup>]

§ 375. **Effect of Recitals in Statutes.**—A mere recital in an Act, whether of fact or of law, is not conclusive, but Courts are at liberty to consider the fact or the law to be different from the statement in the recital, [nor is a party estopped from denying by plea and putting in issue the existence of a fact recited as such even in a public statute,<sup>105</sup>] unless, indeed, it be clear that the Legislature intended that the law should be, or the fact should be regarded, as recited. If, for instance, a road was stated in an Act to be in a certain township, or a town to be a corporate borough, the statement, though some evidence of the fact alleged, would be open to contradiction (d). [So, if a statute recites that a person is a member of a company,<sup>106</sup> that a prior life-tenant of an

(a) *London Joint Stock Bank v. Mayor of London*, 1 C. P. D. 17.

(b) 3 Geo. 4, c. 126, s. 32, and 4 Geo. 4, c. 95, s. 24.

(c) *Weymouth v. Nugent*, 6 B. & S. 22, 34 L. J. 81; *Westover v. Perkins*, 2 E. & E. 57, 28 L. J. 227; *Smithett v. Blythe*, 1 B. & Ad. 509.

<sup>102</sup> *U. S. v. Cigars*, 1 Woolw. 123. And comp. ante, § 124.

<sup>103</sup> *Tilford v. Ramsey*, 43 Mo.

410.

<sup>104</sup> *Wallace v. Holmes*, 9 Blatchf.

65.

<sup>105</sup> *Dougherty v. Bethune*, 7 Ga. 90.

(d) *R. v. Haughton*, 1 E. & B. 501, and *R. v. Greene*, 6 A. & E. 549. [And see *People v. Dana*, 22 Cal. 11, ante, § 122.]

<sup>106</sup> *Scott v. Berkely*, 3 C. B. 925.

estate is dead,<sup>107</sup> or that a person has been attainted of treason,<sup>108</sup> "the court will not act upon such recitals without further evidence, or will allow them to be contradicted."<sup>109</sup> "The highest value which was ever put upon such recitals was their recognition as evidence of the facts contained in them ;"<sup>110</sup> but this sanction was denied them when they formed part of private Acts of Parliament, which were held to be binding upon none but parties and privies.<sup>111</sup> So, in this country, the recitals in a private act are evidence only as against the persons who procured the enactment.<sup>112</sup> The reason for attaching such slight weight to the recitals in statutes is given in an early English case: "This recital cannot be taken to proceed but upon information, and the Court of Parliament may be misinformed as well as other Courts; none can imagine they would purposely recite a false thing to be true. . . . From hence it follows that they do not intend any one to be concluded by such recital grounded upon falsehood, for he who says to the contrary affirms that their intention is to oppress men wrongfully."<sup>113</sup> "When viewed as a key to the interpretation," however, it is said, with much force, "they should in reason be deemed conclusive of the recited facts; because, whether really true or not, they explain the legislative perspective in enacting the statute, and only this is in any case gained by the interpreter in looking at the surroundings."<sup>114</sup> As to the expression of opinion by the Legislature, as the inducement for an enactment, upon a matter of fact of which it is the sole

<sup>107</sup> *Cowell v. Chambers*, 21 Beav. 619.

<sup>108</sup> *Earl of Leicester v. Heydon*, Plowd. 384, 398.

<sup>109</sup> *Wilb.*, p. 15.

<sup>110</sup> *Ibid.*: cit. *R. v. Sutton*, 4 M. & S. 532; *R. v. Berenger*, 3 M. & S. 67.

<sup>111</sup> *Cit. Brett v. Beals*, *Moody & Malkin*, 416; *Taylor v. Parry*, 1 M. & G., at p. 619; *Duke of Beaufort v. Smith*, 4 Ex., at p. 470; *Earl of Shrewsbury v. Scott*, 6 C. B. N. S., at p. 157; *Wharton Peerage*, 12 Cl. & Fin., at p. 302, explained by *Lord St. Leonards in the Shrewsbury Peerage*, 7 H. L. C., at p. 13; *Sturla v. Freccia*,

*L. R.* 12 Ch. D., at p. 432.

<sup>112</sup> *Branson v. Wirth*, 17 Wall. 32. See, also, *State v. Beard*, 1 Ind. 460, to the effect that recitals in the preamble of a private statute are admissible, and, uncontradicted and unqualified, prima facie evidence of the truth of the matters recited, between the person for whose relief it was passed and the State. And see ante, § 284.

<sup>113</sup> *Earl of Leicester v. Heydon*, ubi supra.

<sup>114</sup> *Bish., Wr. L.*, § 50. See, also, the statement there, that "recitations in the preamble must be accepted as, at least, prima facie



judge, as, in an act authorizing a public improvement and subjecting adjacent landholders to taxation to defray its expense, that it is for the benefit of such persons, the correctness or incorrectness of such an opinion cannot, of course, be inquired into by the courts, but the legislative determination of it is binding upon them."<sup>115</sup> But *e. g.*,] the 36 and 37 Vict. c. 60, s. 3, would hardly, by merely reciting that "an accessory after the fact" is "by English law liable to be punished as if he were the principal offender," be understood as making so important a change of the law."<sup>116</sup>

§ 376. **When and how Erroneous Assumption by Legislature may have Force of Enactment.**—[All the instances considered, in which the effect of producing as a result, what was assumed by the Legislature to exist, was denied to its language, have been of such a character as not to compel a necessary inference] that the Legislature intended to alter the law, and to make it as it was alleged to be. A different effect, however, would be given to an Act which showed, whether by recital or enactment, that it intended to effect a change. If the mistake is manifested in words competent to make the law in future, there is no principle which can deny them this effect (a). Such was the effect of the 4 & 5 Vict. c. 48, which enacted that municipal corporations should be ratable in respect of their property, as though it were not corporate property; but that such property, when lying wholly within a borough the poor of which were relieved by one entire poor rate, should continue exempt from ratability "as if the Act had not passed." When the Act was passed, the general opinion was that such property was exempt; but later decisions settled that it was not. It was held that the above enactment exempted them, notwithstanding the final words, which were considered as not conveying a different

and perhaps conclusively, correct;" citing Sedgw. 56; *R. v. Sutton*, 4 M. & S. 532; *Elmondorff v. Carmichael*, 3 Litt. (Ky.) 472; *McReynolds v. Smallhouse*, 8 Bush (Ky.) 447, 456; *Allison v. R. R. Co.*, 10 Id. 1; *Branson v. Wirth*, 17 Wall. 32, 44, and referring to *R. v. Haughton*, 1 Ellis & B. 501; *U. S. v. Claffin*, 97 U. S. 546, and as to

resolutions of the Legislature, to *Comm'r's v. State*, 9 Gill (Md.) 379.

<sup>115</sup> *People v. Lawrence*, 36 Barb. (N. Y.) 177. See post, § 421.

<sup>116</sup> See *per* Lord Chelmsford, in *Jones v. Mersey Docks*, 11 H. L. C., at p. 518.

(a) *Per* Cur. in *P. M. Genl. v. Early*, 12 Wheat. 148.

intention (a). One ground on which the Exchequer Chamber held that the attesting words, "on the true faith of a Christian," of the abjuration oath were essential parts of the oath, was that Parliament had put that construction on them, when allowing the Jews, a few years after enacting the oath, to omit those words when the oath was tendered to them *ex officio* (b). [Thus, a proviso to a statute declaring an act lawful which was so before, that nothing contained in the statute should be construed to permit the doing of some other thing within its general provisions, equally lawful before, would undoubtedly have the effect of prohibiting the latter thing for the future.<sup>117</sup> And conversely, where a statute in forbidding conveyances of land to be made in a particular manner, clearly indicated an intention that conveyances previously so made were to be regarded as valid, it was held operative to sustain the same.<sup>118</sup> So, an act imposing a penalty for the improper use of sidewalks construed by individuals in unincorporated villages was referred to as distinctly recognizing the right to construct the same, and thus relieving them of the objection of being public nuisances.<sup>119</sup> Where a constitutional provision postponed the date of the going into effect of statutes "unless otherwise provided," the fact that other statutes alluded to a certain act passed at the same session and in *pari materia* as being in force, was held to give it immediate effect.<sup>120</sup>

§ 377. [Even penal jurisdiction has been held to be conferred upon justices of the peace as by necessary implication, by a statute expressly assuming it to exist and explicitly regulating the details of its exercise.<sup>121</sup>] A Statute

(a) *R. v. Oldham*, L. R. 3 Q. B. 474.

(b) 1 Geo. 1, st. 2, 10 Geo. 1, c. 4; *Salomons v. Miller*, 8 Ex. 778.

<sup>117</sup> *State v. Eskridge*, 1 Swan (Tenn.) 413.

<sup>118</sup> *McArthur v. Allen*, 3 Cin. L. Bul. (O.) 771.

<sup>119</sup> *Com'th v. Hauck*, 103 Pa. St. 536, 537. But a statute prohibiting a married man from conveying to a woman with whom he lived in adultery more than one-fourth of his estate, would not be deemed to sanction a contract founded on an

immoral consideration, it being but a recognition of the principle that an instrument or obligation, given by a man to a woman with whom he lived in such a relation would not, because of the same, be void: *Cusack v. White*, 2 Mill (S. C.) 279.

<sup>120</sup> *Swann v. Buck*, 40 Miss. 268.

<sup>121</sup> *State v. Miller*, 23 Wis. 634, though the decision concedes that a mere unfounded assumption by the Legislature of the existence of a particular jurisdiction would not

of the United States enacted that the district court should, in certain cases, have concurrent jurisdiction with the state and circuit courts, as if (contrary to the fact) the district court had not already, and the circuit court had, jurisdiction. But though the language plainly indicated only the opinion that the jurisdiction existed in the circuit court, and not an intention to confer it, this effect was nevertheless given to the Act, to prevent its being inoperative, and to carry out what was the obvious object of the Act (*a*). The district court could not have had concurrent jurisdiction with the circuit court, unless the latter could take cognizance of the same suits.

§ 378. **Change of Language.**—The presumption of a change of intention from a change of language, of no great weight in the construction of any documents, seems entitled to less weight in the construction of statutes than in any other case; for the variation is often to be accounted for, not only by a mere desire of improving the graces of style, and of avoiding the repeated use of the same words (*b*), but from the circumstance that Acts are often compiled from different sources; and further, from the alterations and additions from various hands which they undergo in their progress through Parliament. Though the statute is the language of the three estates of the realm, it seems legitimate, in construing it, to take into consideration that it may have been the production of many minds; and that this may better account for the variety of style and phraseology which is found, than a desire to convey a different intention. There is no difference between a “stream” and a “river” in the 24 & 25 Vict. c. 109, ss. 27, 28, (*c*); nor between “ordinary luggage” in an Act, and “personal luggage” in a by-law; (*d*) [nor between the words “the family of any married woman,” in the body of a section of

alone be sufficient to create it: see *Hersom's Case*, 39 Me. 476, ante, § 373.

(*a*) *P. M. Genl. v. Early*, 12 Wheat. 136. [Compare, on the subject of implied grant of jurisdiction, ante, §§ 155, 156.]

(*b*) *Per Blackburn, J.*, in *Had-*

*ley v. Perks*, L. R. 1 Q. B. 457, and *Lord Abinger* in *R. v. Frost*, 9 C. & P. 106.

(*c*) *Rolle v. Whyte*, L. R. 3 Q. B. 305.

(*d*) *Hudston v. Midland R. Co.*, L. R. 4 Q. B. 366.

an act, and "the family of the said husband and wife," in a proviso thereto, the section making her liable for debts contracted by her for necessaries for the support and maintenance the former, and the proviso declaring that judgment should not be rendered against her except upon proof that the contract was her contract, incurred for articles necessary for the latter.<sup>122</sup>] So there is no material difference between "suffering" and "knowingly suffering" persons to gamble in a public house (*a*). To "turn cattle loose" on a public thoroughfare, which is subject to a penalty by the Police Act, 2 & 3 Vict. c. 47, s. 54, is substantially identical with "leaving cattle" there "without a keeper," contrary to the Highway Act, 5 & 6 Will. 4, c. 50, s. 74 (*b*); and the definition in the 6 & 7 Vict. c. 86, of a hackney carriage, as a carriage plying for hire in "any public place," is identical in meaning with the earlier Act, 1 & 2 Will. 4, c. 22, which defined it as plying for hire in any "street or road" (*c*). It may be questioned whether too much importance has not sometimes been attached to a variation of language (*d*). An Act which enacted that "it shall and may be lawful" for a justice to hear a certain class of cases under 50*l.*, and that penalties above that sum "shall" (*e*) be sued for in the Superior Courts, was held equally imperative in both cases, even though the effect was to oust the jurisdiction of the Superior Courts in the former (*f*). So, though one section of the 3 Geo. 4, c. 39, made a warrant of attorney to confess judgment, if not filed within twenty-one days, "fraudulent and void against the assignees" in bankruptcy of the debtor and another made it "void to all intents and purposes," if the defeasance was not written on the same paper as the warrant, it was held, notwithstanding the dissimilarity of the language, that the latter section was not more extensive than the former, but made the warrant of attorney void

<sup>122</sup> Murray v. Keyes, 35 Pa. St. 384, 390.

(*a*) 9 Geo. 4, c. 61; 35 & 36 Vict. c. 94; Bosley v. Davies, 1 Q. B. D. 84.

(*b*) Sherborn v. Wells, 3 B. & S. 784, 32 L. J. M. C. 179.

(*c*) Skinner v. Usher, L. R. 7 Q. B. 423; and see Curtis v. Em-

bery, L. R. 7 Ex. 369.

(*d*) See ex. gr. R. v. South Weald, 5 B. & S. 391; Exp. Jarman, 4 Ch. D. 835.

(*e*) 25 Geo. 3, c. 51. See ex. gr. Haldane v. Beauclerk, 3 Ex. 658; Montague v. Smith, 17 Q. B. 688, 21 L. J. 73.

(*f*) Cates v. Knight, 3 T. R. 442

only as against the assignees (a). The 137th section of the Bankrupt Act of 1849, which made judges' orders, given by consent by a "trader," null and void to "all intents and purposes," unless filed, was held to have no more extensive meaning than the provision just cited of the 3 Geo. 4, c. 39. The word "trader," which is used in the same and the preceding sections, was held to be confined to traders who afterwards became bankrupt; though the word "bankrupt" was used in all the other sections relating to the subject. All of them, however, were prefaced by the preamble that they related to "transactions with the bankrupt" (b).

§ 379. It has been seen that the change of language in the later of the two statutes on the same subject has sometimes the effect of repealing the earlier provision by implication (c). But in those cases the change was too significant of a changed intention to save the earlier Act even from a form of repeal which is not favored in judicial interpretation. The change would make no difference in the sense, when the omitted words of the earlier enactment were unnecessary. Thus, where the first Act, after enacting that in an "indictment" for murder the manner or means of death need not be stated, superfluously provided that the term "indictment" should include "inquisition," which it did *ex vi termini*, without any such provision (d), and a subsequent consolidation Act repealed and re-enacted the same enactment, omitting the unnecessary interpretation clause; it was held that the word "indictment" was to be read in its full and established meaning, and not in the restricted sense in which the Legislature apparently understood it in the earlier statute (e). So, the Merchant Shipping Act of 1854, which required, following an earlier Act, that the transfer of ships should be registered, but omitted the proviso of the earlier, which

(a) *Morris v. Mellin*, 6 B. & C. 446, 9 D. & R. 503; *Bennett v. Daniel*, 10 B. & C. 500, diss. *Holroyd, J., and Parke, J.*; and *Rolfe, B.*, in *Bryan v. Child*, 1 L. M. & P. 437. See, also, *Myers v. Veitch*, L. R. 4 Q. B. 649; *R. v. Tone*, 1 B. & Ad. 561.

(b) *Byran v. Child*, 1 L. M. &

P. 429.

(c) See *ex. gr. West v. Francis*, 5 B. & A. 737.

(d) 2 Hale 155; *Withipole's Case*, Cro. Car. 134. *Aliter* "information," *R. v. Slator*, 8 Q. B. D. 267. 51 L. J. 246.

(e) *R. v. Ingham*, 5 B. & S. 257. 33 L. J. 183.

declared that a transfer not registered should not be valid for any purpose whatever, was construed as making such a transfer void, notwithstanding the omission of the proviso (a.) The 8 & 9 Vict. c. 106, which, after repealing a similar enactment of the preceding session, made certain leases void when not made by deed, was construed as leaving the unsealed document valid as an agreement; although the repealed Act had an express provision to that effect, which the repealing one omitted (b).

§ 380. **Omission of Material Words in Former Phraseology Supplied.**—Even where the omitted words were material to the sense, but might be implied, the omission would not, in itself, be considered material; if leading to consequences not likely to be intended. Thus, although the Bankruptcy Act of 1869, in making an assignment by a debtor of all his property an act of bankruptcy, omitted the words “with intent to defeat or delay his creditors” which had been in former Acts, it was held that no alteration had been made in the law; for those words had been really superfluous and misleading (c). A statute which required witnesses before an election commission to answer self-criminating questions, and indemnified them from prosecution for the offences confessed, if the commissioners certified that they had answered the questions, was held not to differ substantially from an earlier one, which gave the indemnity only when it was certified that the answers were true. The Court shrank from inferring, from the mere dissimilarity of the terms of the two Acts, and though the omitted words were material, the improbable intention, in the later one, to protect a witness who had answered, indeed, in point of fact, but had answered falsely or contemptuously (d). [So, where an act permitting divorce on the ground of desertion required

(a) *Liverpool Borough Bank v. Turner*, 2 DeG., F. & J. 502, 30 L. J. 379.

(b) *Bond v. Rosling*, 1 B. & S. 371, 30 L. J. 227; *Parker v. Taswell*, 2 DeG. & J. 559, 27 L. J. 212; *per Byles, J.*, in *Tidey v. Mollett*, 16 C. B. N. S. 298, 33 L. J. 235.

(c) *Re Wood*, L. R. 7 Ch. 303. See *Horn v. Ion*, 4 B. & Ad. 78. See also *Exp. Copeland*, 2 DeG. M. & G. 9.

(d) *R. v. Hulme*, L. R. 5 Q. B. 377. See *Duncan v. Tindall*, 18 C. B. 558; *Hughes v. Morris*, 2 DeG., M. & G. 849; *McCalmont v. Rankin*, Id. 403.

that the desertion be "without the consent of the party deserted," and a later act omitted those words, it was held that they were implied in the phrase "deserted."<sup>123</sup>

§ 381. **Variations of Phraseology Treated as Insignificant.**—It has, indeed, been said that, generally, statutes in *pari materia* ought to receive a uniform construction, notwithstanding any slight variations of phrase; the object and intention being the same (*a*). It would be difficult, at the present time, to give countenance to the doubt whether an Act which made it felony to steal "horses," in the plural applied to the stealing of one horse, in consequence of an earlier Act having made it felony to steal "any horse" in the singular (*b*). The general language of a statute which repealed one of limited operation, and re-enacted its provisions in an amended form, would be construed as equally limited in operation, unless an intention to extend it clearly appeared (*c*). [The importance of the principle which attaches slight weight to mere changes of phraseology, is particularly manifest in the construction of statutes that are substantially re-enactments, or that are intended as revisions or consolidations of others. As to such enactments, it is well settled in this country, that, in the absence of an intention to change the law, sufficiently clearly appearing from other guides of interpretation, or unless the change is such as, in itself, to render such an intention manifest and certain, mere variations in the language of such enactments from the language of former statutes on the same subject, under which the law has become settled, will not be regarded as intended to call for a different construction.<sup>124</sup> And so, too, where the meaning of the phrase in the former statute was made clear by

<sup>123</sup> *Ford v. Ford*, 143 Mass. 577, 578.

(*a*) *Per Cur.* in *Murray v. E. I. Co.*, 2 B. & A. 215, referring to the Statutes of Limitations.

(*b*) 2 Hale, 365.

(*c*) *Per Cur.* in *Brown v. McLachlan*, L. R. 4 P. C. 543.

<sup>124</sup> *Yates' Case*, 4 Johns. (N. Y.) 318; *Re Brown*, 21 Wend. (N. Y.) 316; *Dominick v. Michael*, 4 Sandf. (N. Y.) 374; *Theriat v. Hart*, 2 Hill (N. Y.) 380; *People v. Den-*

*ning*, 1 Hilt. (N. Y.) 271; *Crosswell v. Crane*, 7 Barb. (N. Y.) 191; *Hoffman v. Delihanty*, 13 Abb. Pr. (N. Y.) 388; *Douglas v. Douglas*, 5 Hun (N. Y.) 140; *Chambers v. Carson*, 2 Whart. (Pa.) 9; *Com'th v. Rainey*, 4 Watts & S. (Pa.) 186; *Hughes v. Farrar*, 45 Me. 72; *Burnham v. Stevens*, 33 N. H. 249; *McNamara v. R. R. Co.*, 12 Minn. 388; *Gaston v. Merriam*, 83 Id. 271; *Conger v. Barker*, 11 Ohio St. 1; *Overfield v. Sutton*, 1 Metc.

the act itself;<sup>126</sup> and especially so, when the revision in which the departures from the former phraseology occur was designed to "condense as far as practicable" the former legislation on the various subjects embraced by it.<sup>127</sup> To illustrate: An act directing sheriffs, etc., to give certain recognizances and bonds for the faithful execution of their duties, provided, that actions might be instituted upon such recognizance by individuals aggrieved, "and if upon such suit it shall be proved what damage hath been sustained, and a verdict and judgment shall be thereupon given, execution shall issue for so much only as shall be found by the said verdict and judgment with costs, which suits may be instituted, and the like proceedings be thereupon had, as often as damage shall be so as aforesaid sustained." Under this act, it was held,<sup>127</sup> that, in a suit upon the recognizance, the judgment was not to be entered for the penalty for the use of those interested, but for the damage sustained by the party suing. An act was subsequently passed "relative to bonds with penalties, and official bonds," which provided that "every bond or obligation which shall be given to the Commonwealth by any public officer," may be sued and prosecuted in the manner therein prescribed, *i. e.*, permitting only one suit and one judgment to be entered, and the interest of all persons aggrieved to be, from time to time, suggested on the record, and proceedings to be had by writs of scire facias on such judgments to ascertain the amounts which each may be entitled to recover. So much in the earlier act as related to proceedings on the official bond of the sheriff was clearly supplied and therefore repealed by the later act. It was claimed, however, that "every bond and obligation" included also the recognizance, which is defined to be an "obligation of record."<sup>128</sup> The earlier act throughout, used the word "obligation" in contradistinction to "recognizance." The later act employed the term "bond or obligation," except in two paragraphs, in the one

(Ky.) 621; *Allen v. Ramsey*, Id. 635; *Ennis v. Crump*, 6 Tex. 34; and cases *infra*.

<sup>126</sup> *Douglas v. Douglas*, *supra*.

<sup>127</sup> *Hughes v. Farrar*, *supra*.

<sup>127</sup> See *Wolverton v. Com'th*, 7 Serg. & R. (Pa.) 273.

<sup>128</sup> 2 Blackst., Comm. 341; *Williamson v. Mitchell*, 1 Pen. & W. (Pa.) 11.



of which in the words were "such bond," in the other "any bond as aforesaid." The remedies given in these portions of the statute being thus clearly confined to the bonds, which, if the words "bonds or obligations" in the other parts of the act were to include recognizances and therefore repealed the earlier act as to such also, would leave the system of remedies provided incomplete, it was held that the change from the phrase "obligation" to that of "bond or obligation" did not make the latter mean anything different from the former, and that consequently, as concerned the sheriff's recognizances, the latter act did not change the former.<sup>129</sup> An act originally read that no person holding office, etc., should be liable to military or jury duty, *nor* to arrest on civil process, *or* to service of subpoenas, etc., while actually on duty. It was re-enacted with the change of the "nor" into "or," and of the "or" into "nor." It was claimed, on the strength of this change, that the phrase "while actually on duty" must be construed as limiting only the clause relating to service of subpoenas. But the court refused to recognize such as the effect of so slight a change of phraseology.<sup>130</sup> Where an act inflicted a punishment upon the father *or* mother abandoning his or her child, and a revision of laws embodying the act referred to inflicted the punishment "if the father *and* mother," etc., it was held, that, as the variation in the language was too slight to raise a presumption that the Legislature intended to change the law, "and" should be read "or," in the revision.<sup>131</sup> Conversely, a substitution, in a re-enactment of an earlier statute, of "unlawful or forcible entry," was read "unlawful and forcible entry," as in the original act.<sup>132</sup> And where

<sup>129</sup> *McMicken v. Com'th*, 58 Pa. St. 213. The Pennsylvania acts of 1839 and 1854 directed certain courts to "proceed upon the merits of the complaint and determine *finally* concerning" certain election contests; the constitution of 1874, art. viii, § 17, directs that the "trial and determination" of election contests shall be by the courts; and the act of 1874 directs that certain election contests shall be "tried and determined" by certain courts. It had been held that no appeal on

the merits lay under the acts on 1839 and 1854 from the judgment of the lower to the Supreme Court: *Election Cases*, 65 Pa. St. 20; it was held that none lay under the act of 1874: *Carpenter's App.*, 11 W. N. C. 162.

<sup>130</sup> *Coxton v. Dolan*, 2 Daly (N. Y.) 66. See this case, post, §§ 414, 415.

<sup>131</sup> *State v. Smith*, 46 Iowa, 670.

<sup>132</sup> *Winterfield v. Strauss*, 24 Wis. 394.

an act passed in 1866, amended and re-enacted another, passed in 1858, providing that every conveyance not recorded should be void as against attachment and judgment creditors, but omitted the words "hereafter made," which were in the act of 1858, it was held, nevertheless, not to apply to conveyances executed before the latter statute had been passed.<sup>133</sup> All the more self-evident is this rule, where the variation in the language of the later act is only designed to adopt by precise language the construction placed upon the former one.<sup>134</sup>

§ 382. **When Difference in Language Indicative of Difference in Meaning.**—As the same expression is presumed to be used in the same sense throughout an Act, or a series of cognate Acts, so a difference of language may be *prima facie* regarded as indicative of a difference of meaning (*a*). ["Indeed, the words of a statute, when unambiguous, are the true guide to the legislative will. That they differ from the words of a prior statute on the same subject, is an intimation that they are to have a *different* and not the *same* construction, for it is as legitimate a use of the legislative power to alter prior statutes as to displace the common law."<sup>135</sup>] A man who sends his servants or his dogs on the land of another, would be, in law, as much a trespasser as if he had entered on the land in person (*b*); but an Act which imposed a penalty for committing a trespass "by entering or being" upon land, would be construed as limiting, by these superadded words, the trespass to a personal entrance (*c*). The 59th section of the Pilot Act, 6 Geo. 4, c. 125, which exempts from com-

<sup>133</sup> *Gaston v. Merriam*, 33 Minn. 271. See *Bishop v. Schneider*, 46 Mo. 472, where, under a provision of the General Statutes, adopted in 1865, that, so far as they are the same with those of existing laws, they shall be construed as continuing the latter in force, and not as new enactments, it was held that a provision curing defects in conveyances "heretofore" made, identical with a provision of an act passed in 1855, was confined in its operation to conveyances made before the last mentioned act.

<sup>134</sup> *Com'th v. Messenger*, 4 Mass.

462; *Movers v. Bunker*, 29 N. H. 420.

(*a*) *Per* Lord Tenterden in *R. v. Great Bolton*, 8 B. & C. 74; *Rickett v. Met. R. Co.*, L. R. 2 H. L. 207. [*Lehman v. Robinson*, 59 Ala. 219; *Rutland v. Mendon*, 1 Pick. (Mass.) 154.]

<sup>135</sup> *Rich v. Keyser*, 54 Pa. St. 86, *per* Woodward, C. J., at p. 89.

(*b*) *Baker v. Berkeley*, 3 C. & P. 32; *Dimmock v. Allenby*, 7 Taunt. 489.

(*c*) *R. v. Pratt*, 4 E. & B. 860; and see *Read v. Edwards*, 17 C. B. N. S. 245.

pulsory pilotage any ship whatever which "is" within the limits of the port to which she belongs, was construed as exempting from compulsory pilotage a London vessel while within the port of London, though on a voyage from Bordeaux; but she would not have been exempted under the 379th section of the Merchant Shipping Act of 1854, which exempts ships "navigating" within the limits of the port to which they belong (a). [Where one act of 1772, authorizing summary proceedings to oust a tenant, required three months' notice before application for that purpose to the justices, and a later one of 1863, three months' notice before the expiration of the term, it was held that the same meaning could not be properly given to the latter, as had been given to the earlier act, and that, therefore, it did not operate as a repeal of the same, but gave an additional remedy.<sup>136</sup> "The Legislature of 1863 must be presumed to have known what the language of the Act of 1772 was, and what judicial construction had been placed upon it. Then, knowing this, and yet not following it, did they not mean that we should construe their language according to its ordinary import?"<sup>137</sup>

§ 383. **Variation of Language in Same Act.**—[The rule that different expressions indicate a different intent applies, of course, also to expressions within the same act.] Thus, where one section of the Adulteration of Food Act imposed a penalty for selling, as unadulterated, articles of food which were adulterated; and another provided that the seller of an article of food who, knowing that it was mixed with a foreign substance to increase its bulk or weight, did not declare the admixture to the purchaser, should be deemed to have sold an adulterated article; the former section would reach a seller who was ignorant of the adulteration; since, where knowledge was intended to be an element in an offence under

(a) *The Stettin*, Br. & Lush. 199. But see *Genl. St. Nav. Co. v. Brit. & Colon. St. Nav. Co.*, L. R. 4 Ex. 238.

<sup>136</sup> *Rich v. Keyser*, supra.

<sup>137</sup> *Ibid.*, at p. 89. It will be observed, that, in this case, this effect of the change of language,

in itself very significant, was aided by the presumption against an intention to repeal; as, in the case of *McMicken v. Com'th*, 58 Pa. St. 213, ante, § 381, was the contrary construction of the language there before the court.

the Act, the Legislature had conveyed its intention in express terms (a). In an Act (59 Geo. 3, c. 50) which provided that no person should acquire a settlement in a parish by a forty days' residence in a tenement rented by him, unless, if a house, it was "held," and if land, it was "occupied" by him for a year, effect was given to the two different words as expressing different ideas, by holding that a house need not be "occupied" for the purpose of acquiring a settlement (b); though, it was observed, this was probably not really intended by the Legislature (c). The 9 Geo. 4, c. 14, which admits of no acknowledgment of a debt to bar the Statute of Limitations unless it be signed by "the party chargeable thereby," was held not satisfied by the signature of an agent, partly because other provisions spoke expressly of agents as well as of principals, and thus showed that the Legislature had not in its contemplation the maxim that *qui facit per alium facit per se* (d). [And so, in a case already referred to,<sup>138</sup> the use of the word "bond" in the portions of the act giving the remedy, narrowed the construction of the phrase "bond or obligation" previously used, and precluded their construction as embracing recognizances.]

§ 384. **Omitted Words of Earlier Act when not supplied in Later.**—[An omission in a later Act of words used in an earlier one, and not supplied by any natural sense of the words employed<sup>139</sup> or suggested by the interaction of some other rule of construction,<sup>140</sup> cannot be read into the later statute so as to restrict its operation;<sup>141</sup> although it may seem likely, that the omission of the qualifying words was uninten-

(a) *Fitzpatrick v. Kelly*, L. R. 8 Q. B. 337. See *Pope v. Tearle* and *Roberts v. Egerton*, L. R. 9 Q. B. 494, 43 L. J. M. C. 129 and 135.

(b) *R. v. North Collingham*, 1 B. & C. 578; *R. v. Great Bolton*, 8 B. & C. 71.

(c) *Per Best, J.*, in *R. v. N. Collingham*, *ubi sup.* See other *Illust. in Lawrence v. King*, L. R. 3 Q. B. 345; *Exp. Gorely*, 4 DeG. J. & S. 477; *Gale v. Laurie*, 5 B. & C. 156; *Cornhill v. Hudson*, 8 E. & B.

429; *Wiley v. Crawford*, 1 E. B. & E. 253.

(d) *Hyde v. Johnson*, 2 Bing. N. C. 776.

<sup>138</sup> *McMicken v. Com'th*, *supra*, ante, § 381.

<sup>139</sup> See *Ford v. Ford*, 143 Mass. 577, ante, § 380.

<sup>140</sup> As to the presumption against retrospective operation: see *Gaston v. Merriam*, 33 Minn. 271, ante, § 381.

<sup>141</sup> See, for an instance, *R. v. Llangian*, 4 B. & S. 249; 32 L. J. M. C. 225, ante, § 199.

tional.<sup>142</sup> Thus when an act subjected certain vegetable substances "used for cordage" to duty, and a later act enumerated as dutiable the same substances, without adding the qualifying words "used for cordage," the court refused to supply the same.<sup>143</sup> So, where an act prohibited the carrying of concealed weapons, with an exception as to persons journeying out of the state, and a later act, covering the whole subject-matter of the former and consequently repealing it, omitted this exception, it was held to be wiped out.<sup>144</sup> Again, where the later of two acts upon limited partnerships omitted the infliction, prescribed by the earlier, of a penalty for the omission of certain matters required by both, the court said: "we must presume that the [earlier] act . . . and the decisions under it were well known to the law-makers at the time the [later] act . . . was passed. The omission to prescribe the penalty . . . is good reason for concluding that no such liability was intended."<sup>145</sup> As applied to the construction of revisions and codifications and their effect upon such portions of the older enactments incorporated in them, which they do not reproduce, the effect of their omission has been already considered.<sup>146</sup> Unlike a mere change in the phraseology, such an omission, which cannot of course be supposed to have been unintentional,<sup>147</sup> is, in general to be regarded as a repeal of the omitted acts or provisions, and the courts are not at liberty to revive them, by construction.<sup>148</sup>]

§ 385. **Words construed in Bonam Partem.**—It is said, and in a certain and limited sense truly, that words must be taken in a lawful and rightful sense. When an Act, for instance, gave a certain efficacy to a fine levied of land, it meant only a fine lawfully levied (*a*). The provision that a judgment

<sup>142</sup> Woodbury v. Berry, 18 Ohio St. 456. And comp. ante, § 16.

<sup>143</sup> Wills v. Russell, 100 U. S. 621.

<sup>144</sup> Poe v. State, 85 Tenn. 495.

<sup>145</sup> Eliot v. Himrod, 108 Pa. St. 569, 573. See, also, ante, § 199.

<sup>146</sup> See ante, §§ 201-203.

<sup>147</sup> State v. Clark, 57 Mo. 25.

<sup>148</sup> See Ellis v. Paige, 1 Pick. (Mass.) 43, 45; Blackburn v. Walpole, 9 Id. 97; Stafford v.

Creditors, 11 La. An. 470; Buck v. Spofford, 31 Me. 34; Pingree v. Snell, 42 Id. 53; Broadus v. Broadus, 10 Bush (Ky.) 299; Campbell v. Case, 1 Dak. 17; Tafoya v. Garcia, 1 N. M. 480; and cases in preceding notes, and ante, §§ 195-196, 201, 202.

(*a*) Co. Litt. 381b; 2 Inst. 590. [And "entitled" means legally entitled: ante, p. 155, note (*b*). See also § 44.]

in the Lord Mayor's Court, when removed to the Superior Court, shall have the same effect as a judgment of the latter, would not apply to a judgment which the inferior tribunal had no jurisdiction to pronounce (*a*). So, an Act which requires the payment of rates as a condition precedent to the exercise of the franchise would not be construed as excluding from it a person who refused to pay a rate which was illegal, though so far valid that it had not been quashed or appealed against (*b*). A statutory authority to abate nuisances would not justify an order to abate one, when it could not be obeyed without committing a trespass (*c*). A highway surveyor, who is required by the Highway Act of 1862 to "conform in all respects to the orders of the board in the execution of his duties," is, like the clergyman who had sworn canonical obedience to his bishop (*d*), bound to obey only lawful orders, which his superior has authority to give; so that he is personally liable for his act, if the board had no jurisdiction to make the order under which he did it (*e*). The 199th section of the Companies Act, 1862, providing for the winding up of companies of more than seven members not registered under the Act, applies only to companies which may be lawfully formed without registration, but not to those which are prohibited unless registered (*f*). [Perhaps, upon this ground, as well as that of a presumption against an intended operation beyond the immediate or specific object of the enactment, rest the decisions that an act validating certain sales made by persons in a fiduciary capacity in whose appointment or qualification there existed some defect or irregularity, cured only defects in proceedings of such courts as had jurisdiction of the subject-matter, and did not validate a sale made by a trustee who was irregularly or defectively appointed or qualified by a court that had no jurisdiction to make such an appoint-

(*a*) *Bridge v. Branch*, 1 C. P. D. 633.

(*b*) *R. v. Windsor* (Mayor of), L. R. 7 Q. B. 908. See, also, *Bruyeres v. Halcomb*, 3 A. & E. 381.

(*c*) *Publ. Health Act*, 1875, 38 & 39 Vict. c. 55; *Mayor of Scarborough v. Rural Authority of Scar-*

*borough*, 1 Ex. D. 344.

(*d*) *Long v. Grey*, 1 Moo. N. S. 411.

(*e*) *Mill v. Hawker*, L. R. 10 Ex. 92; comp. *Dews v. Riley*, 11 C. B. 434, 2 L. M. & P. 544.

(*f*) *Re Padstow, etc., Assoc.* 20 Ch. D. 137, 51 L. J. 345.

ment ;<sup>149</sup> that an act declaring in force all ordinances of a city or other corporation "in operation" at the date of its passage, did not embrace one which had before been judicially pronounced inoperative ;<sup>150</sup> and that an act authorizing the conveyance by a certain county to the state of such lands as the former should then hold by virtue of tax deeds issued upon sales for delinquent taxes theretofore made, was inapplicable to lands of which the tax deeds held by the county were void on their faces, though there were no lands to which the act, thus construed, could apply.<sup>151</sup>]

§ 386. **Multiplicity of Words.**—Where words have each a separate and distinct meaning, its exact sense ought, *prima facie*, to be given to each ; for the Legislature is not supposed to use words without a meaning. But the use of tautologous expressions is not uncommon in statutes. Thus, an Act which makes it felony "falsely to make, alter, forge, or counterfeit" a bill of exchange, gains little in strength or precision by using four words where one would have sufficed. It cannot be doubted that he who falsely makes, or alters, or counterfeits a bill is guilty of forging it (*a*). [It is not permissible, therefore, to wrest words from their proper and legal meaning, simply because they are superfluous ;<sup>152</sup> just as it is unsafe, in the construction of a special act, to depart from the plain meaning of its language in order to give it any other effect than that of an express affirmation of a duty which would otherwise have been implied.<sup>153</sup>]

§ 387. **Same and Different Meanings in Same Word.**—It has been justly remarked that, when precision is required, no

<sup>149</sup> Halderman v. Young, 107 Pa. St. 324.

<sup>150</sup> Allen v. Savannah, 9 Ga. 286.

<sup>151</sup> Haseltine v. Hewitt, 61 Wis. 121. And see ante, § 115. A general statute relating to gaming, giving an action to recover money lost at gaming to the loser or "any other person," does not include the wife of the loser, but means persons competent to sue : Moore v. Settle, 82 Ky. 187. (See Opin. of Justices, 136 Mass. 578, where an act authorizing the governor to appoint nine *persons*

to constitute a board of health, etc., was held to authorize the appointment of a woman.) And the limitation to twenty days of the time within which a certiorari might be taken to the judgment of a justice of the peace was held to apply only in cases where the justice had jurisdiction : Graver v. Fehr, 89 Pa. St. 460, 464 ; and see Lacock v. White, 19 Id. 495.

(*a*) Teague's Case, R. & R. 33.

<sup>152</sup> Hough v. Windus, L. R. 12 Q. B. D. 229.

<sup>153</sup> See Morris, etc., Co. v. State, 24 N. J. L. 62.

safer rule can be followed than always to call the same thing by the same name (*a*). [“It is the bungling attempts of the penman to say the same thing in different words, which so frequently involves the meaning of the Legislature in uncertainty.”<sup>154</sup>] It is, at all events, reasonable to presume that the same meaning is intended for the same expression in every part of the Act (*b*). But the presumption is not of much weight. In the 12 & 13 Vict. c. 96, for instance, which makes any “person” in a British possession charged with any crime at sea liable to be tried in the colony, and provides that where the offence is murder or manslaughter of any “person” who dies in the colony of an injury feloniously inflicted at sea, the offence shall be considered as having been committed wholly at sea; the word “person” would include any human being, when relating to the sufferer, but would, as regards the offender, include only those persons who, on general principles of law, are subject to the jurisdiction of our Legislature, and responsible for their acts (*c*). In the enactment which makes it felony for anyone, “being married,” to “marry” again while the former marriage is in force, the same word has obviously two different meanings, necessarily implying the validity of the marriage in the one case, and as necessarily excluding it in the other (*d*). So, it seems to have been once thought, that, in the Act of Anne, which gave the loser at play a right to recover by action his losses above 10*l*., when lost at a single sitting, and gave an informer the right to recover them, and treble value besides, if the loser did not take proceedings in time, the expression “a single sitting” might receive two different meanings, according as the plaintiff was the loser, or an informer: that is, that a sitting suspended for dinner should be held single and continuous when the loser sued, but be broken into two

(*a*) Sir G. C. Lewis, Obs. and Reas. in Polit., vol. i. p. 91.

<sup>154</sup> Mayor of Philad'a v. Davis, 6 Watts & S. (Pa.) 269, 278, *per* Gibson, C. J.

(*b*) Courtauld v. Legh, L. R. 4 Ex. 40, *per* Cleasby, B.; R. v. Poor Law Comm'rs, 6 A. & E. 68, *per* Lord Denman. *Re* Kirkstall Brewery, 5 Ch. D. 535. Comp.

the judgments of Cockburn, C. J., in *Smith v. Brown*, L. R. 6 Q. B. 729, and of Baggalay, L. J., in the *Franconia*, 2 P. D. 174.

(*c*) See *U. S. v. Palmer*, 3 Wheat. 631; and see *R. v. Lewis, Dears.*, C. & B. 182, and other cases cited, *sup.* § 174 *et seq.*

(*d*) *R. v. Allen*, L. R. 1 C. C. 387.



sittings when the action was brought by the informer; on the ground that in the one case the act was remedial, and therefore entitled to a beneficial construction, while in the latter it was penal, and therefore was to be construed strictly (a). But unquestionably the interpreter is bound, in general, to disclaim the right to assign different meanings to the same words on the ground of a supposed general intention of the Legislature (b).

§ 388. **Particular Expressions Frequently Used in Statutes. Gender, Number, etc.**—It may be convenient to mention, in this connection, the meaning in which a few words and expressions in frequent use in statutes, are, in general, understood. It has been enacted [in England], that, in statutes passed after 1850, words importing the masculine gender include females,<sup>155</sup> the singular includes the plural,<sup>156</sup> and the plural the singular,<sup>157</sup> unless the contrary is expressly provided. The word "land" includes messuages, tenements and hereditaments, houses and buildings of any tenure, unless there are words to exclude houses and buildings, or to restrict the meaning to tenements of some particular tenure,<sup>158</sup> and

(a) *Bones v. Booth*, 2 W. Bl. 1226. [Comp. post, § 514.]

(b) *Per* Lord Denman in *R. v. Poor Law Com.*, 6 A. & E. 56.

<sup>155</sup> See similar construction, ante, § 103: also *Smith v. Allen*, 31 Ark. 268, where a statutory provision "when any man shall die leaving minor children and no widow," was held to apply to a woman dying, leaving a minor child and no husband. *Comp. R. v. Smith, R. & R.* 267, that, "his" includes "hers."

<sup>156</sup> Recognized in *Garrigus v. Comm'rs*, 39 Ind. 66, but as applicable only where the clear sense of the words, as shown by the context, renders such construction necessary.

<sup>157</sup> See *State v. Main*, 31 Conn. 572, where keeping a house of ill-fame was held punishable under a statute against keeping "houses" of ill-fame. See, also, *Hill v. Williams*, 14 Serg. & R. (Pa.) 287, 289.

<sup>158</sup> See ante, § 3. It means the land with the improvements:

*Croskey v. Manuf'g Co.*, 48 Ill. 481; (but see *Puryear v. Puryear*, 4 Bax. (Tenn.) 526;) lands, tenements and hereditaments, and all rights thereto and interests therein or appurtenant thereto: *Alexander v. Miller*, 7 Heisk. (Tenn.) 65; *Cincinnati College v. Yeatman*, 30 Ohio St. 276; *Lawrence v. Belger*, 31 Id. 175 (vested remainders); *State v. Tichenor*, 41 N. J. L. 345 (ways appurtenant: but see *Taylor v. Welbey*, 36 Wis. 42, that "inclosure" includes only the tract surrounded by an actual fence, and the fence, but not a part of the highway outside, of which the owner of the tract has the fee,—under an act limiting the right of distraining animals damage feasant to those doing so upon an inclosure); *People v. N. Y. Tax, etc.*, Comm'rs, 23 Hun (N. Y.) 687 (easements); *People v. N. Y. Tax, etc.*, Comm'rs, 82 N. Y. 459 (foundations, columns and superstructure of elevated railway. See *Frankfort, etc., Turnp. Co. v. Com'th*, 82 Ky. 386, that the

the words "oath," "swear," and "affidavit,"<sup>159</sup> include affirmation, declaration, affirming and declaring, in the case of persons by law allowed to declare or affirm, instead of swearing (*a*). [The "passage" of an act, in general, means its completion as a law, by the approval of the executive, its passage over his veto, or the expiration of the time limited for its return if neither signed nor vetoed.<sup>160</sup>]

When imprisonment is provided, immediate imprisonment is generally understood (*b*), and "forfeiture" means forfeiture to the Crown, except when it is imposed for wrongful detention or dispossession; in which cases the forfeiture goes to the benefit of the party wronged (*c*). [A difference is said to exist between a forfeiture at common law, and a forfeiture given by statute; the former operating to change the property only after some step taken by the Government to assert its title; the latter divesting the thing forfeited, and vesting it in the Government, etc., immediately or upon the performance of some future act, according to the will of the Legislature,—immediately where no future time or act is pointed out by the statute, so as to bar any action or defence to which the offender would otherwise, as owner, be entitled.<sup>161</sup>] When a "second offence" is the subject of distinct punishment, it is an offence committed after conviction of a first (*d*). [And, it may here be added,

interest of a turnpike company in a turnpike is included under "property" in a taxing act. So improved land was held to include ground appropriated for a railroad: *Road in Lancaster*, 68 Pa. St. 396; improvements, under mechanics' lien laws, to include repairs and additions: *Getchell v. Allen*, 34 Iowa, 559; and see *Schmidt v. Armstrong*, 72 Pa. St. 855; but not ordinary houses, under an act relating to improvements, etc., in works erected on colliery leaseholds: *Schenley's App.*, 70 Id. 98; and the "improvement" of a street, in an act requiring notice before the passage of an ordinance for that purpose, was held to include its vacation: *State v. Chambersburg*, 39 N. J. L. 257.

<sup>159</sup> An affidavit is an oath in

writing, made before and attested by one who has authority to administer the same: *Knapp v. Duclo*, 1 Mich. (N. P.) 189; *Windley v. Bradway*, 77 N. C. 33. See *Harris v. Lester*, 80 Ill. 307.

(*a*) 13 & 14 Vict. c. 21, § 4.

<sup>160</sup> *Logan v. State*, 8 Heisk. (Tenn.) 442. It may mean its taking effect: see ante, §§ 181, 298 note.

(*b*) 8 Rep. 119; comp. 11 & 12 Vict. c. 43, s. 25.

(*c*) 1 Inst. 159; 11 Rep. 60.

<sup>161</sup> *Sedgw.*, p. 78, cit. *Wilkins v. Despard*, 5 T. R. 112; *Roberts v. Wetherall*, Salk. 223; 12 Mod. 92; *U. S. v. Bags of Coffee*, 8 Cranch, 398; *Bennett v. Art Union*, 5 Sandf. (N. Y.) 614.

(*d*) 2 Inst. 468. [Bish., *Wr. L.*, § 240, cit. *People v. Butler*, 3 Cow. (N. Y.) 347.]

the "same offence," as used in a constitutional provision, forbidding a person to be twice put in jeopardy of life and limb for the same offence, means the same both in law and fact, so that, where an act is an offence by the articles of war and also by the criminal law, a trial and acquittal upon a charge of it by a court-martial will not shield the perpetrator from indictment for it.<sup>162</sup>] When a statute requires that something shall be done "forthwith," or "immediately," or even "instantly," it would probably be understood as allowing a reasonable time for doing it (a). An application to deprive a plaintiff of costs, which must be made "at the trial," was deemed made in time, when made an hour after the trial was over, and the judge was trying another cause (b).

§ 389. **Day, Week, Month, etc.**—Half a year consists of 182, and a quarter of 91 days (c). The word "month" means calendar month,<sup>163</sup> unless words be added showing lunar month to be intended (d). [A "day" means the whole of 24 hours from midnight to midnight.<sup>164</sup>] It used to be laid

<sup>162</sup> U. S. v. Cash'el, 1 Hugh. 552. See § 517, note 12.

(c) See *Toms v. Wilson*, 4 B. & S. 455, 32 L. J. 33 & 282; *Forsdike v. Stone*, L. R. 3 C. P. 607; *per Cockburn, C. J.*, in *Griffith v. Taylor*, 2 C. P. D. 202; *Massey v. Sladen*, L. R. 4 Ex. 13; *R. v. Aston*, 1 L. M. & P. 491. *Comp. Exp. Silence*, 47 L. J. Bkcy. 87; *Gibbs v. Stead*, 8 B. & C. 533; *Tennant v. Bell*, 9 Q. B. 684.

(b) *Jud. A.* 1875, ord. 55; *Kynaston v. Mackinder*, 47 L. J. Q. B. 76. See, also, *Page v. Pearce*, 8 M. & W. 677. *Comp. R. v. Berks*, 4 Q. B. D. 469. [Compare ante, § 247—In an act concerning the licensing of the sale of liquors in a certain county, and providing that it should go into effect if a majority of the voters of said county should so determine, it was held that this meant a majority of the voters voting on that subject at a general election: *Walker v. Oswald* (Md.) 11 Centr. Rep. 123. See *State v. Hayes*, 61 N. H. 264, 330, for the principles of construction of an act of similar kind, as to whether it was to be

construed a delegation of legislative power.]

(c) *Co. Litt.* 135b; 5 Rep. 61; 20 Jac. 166. [*Comp. Bish., Wr. L.*, § 106: "A year . . . embraces 365 days, or 366, according as the particular year in question happens to be a leap year or not. Still the meaning of this term may vary with the subject and the evident intent:" cit. *Engleman v. State*, 2 Ind. 91; *Paris v. Hiram*, 12 Mass. 262; *Thornton v. Boyd*, 25 Miss. 598; *Bartlett v. Kirkwood*, 2 Ellis & B. 771.]

<sup>163</sup> *Hunt v. Holden*, 2 Mass. 170; *Avery v. Pixley*, 4 Id. 460; *Churchill v. Bank*, 19 Pick. (Mass.) 532; *Brudenell v. Vaux*, 2 Dall. (Pa.) 302; *Com'th v. Chambre*, 4 Id. 143; *Moore v. Houston*, 3 Serg. & R. (Pa.) 144; *Gross v. Fowler*, 21 Cal. 392; *Bish., Wr. L.*, § 105, and cases there cited. And see *Snyder v. Warren*, 2 Cow. (N. Y.) 518; *Parsons v. Chamberlain*, 4 Wend. (N. Y.) 512; *People v. New York*, 10 Id. 393.

(d) 13 & 14 Vict. c. 21, s. 4.

<sup>164</sup> *Zimmerman v. Cowan*, 107 Ill. 631; *Kane v. Com'th*, 89 Pa.

down as a general rule that courts refused to take notice of the fraction of a day, for the uncertainty, which is always the mother of confusion and contention (*a*); and in civil cases, a judicial act, such as a judgment, is taken conclusively to have been done at the first moment of the day (*b*). But as regards the acts of parties, including, in this expression, acts which, though in form judicial, are in reality the acts of parties, the courts do notice such fractions, whenever it is necessary to decide which of two events first happened (*c*). Thus, they will notice the hour when a party issued a writ of summons, or filed a bill, or delivered a declaration, or the sheriff seized goods (*d*). A person who was keeping a dog at noon without a license would not escape from conviction by procuring a license at one P.M. (*e*). Where the title of the Crown and of the subject accrue on the same day, the title of the Crown is preferred (*f*). [The doctrine that the law knows no fraction of a day, has, in general, been adhered to in this country,<sup>155</sup> both as to contract rights and statutes. So, in regard to a statute relating to the filing of affidavits of renewal of mortgages,<sup>156</sup> or affidavits of defence,<sup>157</sup> or to the service of notices,<sup>158</sup> or the assessment of taxes.<sup>159</sup> But, both as to contracts and statutes, the rigidity of this rule has been much relaxed, and the same has, indeed, been said to be inapplicable, in cases where the purposes of justice

St. 522 (prohibiting liquor selling on the day of a public election). See post, § 534.

(*a*) 3 Rep. 36a; Clayton's case, 5 Rep. 1b.

(*b*) Shelly's case, 1 Rep. 98; Wright v. Mills, 4 H. & N. 488, 28 L. J. Ex. 223.

(*c*) *Per* Grove, J., in Campbell v. Strangeways, 3 C. P. D. 107; *per* Lord Mansfield in Combe v. Pitt, 3 Burr. 1434; *per* Patteson, J., in Chick v. Smith, 8 Dowl. 387; *per* Cur. in Edwards v. Reg. 9 Ex. 628, 23 L. J. 165; Thomas v. Desanges, 2 B. & A. 286; Sadler v. Leigh, 4 Camp. 197; Woodland v. Fuller, 11 A. & E. 859; Tomlinson v. Bullock, 4 Q. B. D. 232; Clarke v. Bradlaugh, 8 Q. B. D. 63, 51 L. J. 1. See further, post, §§ 497, 498.

(*d*) 2 Lev. 141, 176; and *per* Cur. in Edwards v. Reg., 9 Ex. 628.

(*e*) Campbell v. Strangeways, 3 C. P. D. 107.

(*f*) R. v. Crump, 2 Ves. 295; 2 Shaw, 481; R. v. Giles, 8 Pri. 293; Giles v. Grover, 9 Bing. 128; Edwards v. R., 9 Ex. 628; 23 L. J. 165.

<sup>155</sup> See Bish., Wr. L., § 108. Also Zimmerman v. Cowan, 107 Ill. 631.

<sup>156</sup> Griffin v. Forrest, 49 Mich. 309.

<sup>157</sup> Duncan v. Bell, 28 Pa. St. 516. But see Brun v. David, 1 Bro. (Pa.) 323.

<sup>158</sup> Duffy v. Ogden, 64 Pa. St. 240.

<sup>159</sup> Plowman v. Williams, 3 Tenn. Ch. 181.

require the court to notice fractions of a day;<sup>170</sup> and, of course, where a case turns upon the question of priority of one act over an other, the party on whom the burden of proof lies, fails, if he merely shows that both were done on the same day.<sup>171</sup>

[No such rule applies as to fractions of a week.<sup>172</sup> Prima facie, a week is a definite period of time, commencing on Sunday and ending on Saturday;<sup>173</sup> or, at least, according to more general acceptation, a period of seven days. Thus, where an order of court required commissioners, appointed on an application for the division of a township, to give certain notices by publication in newspapers, "three weeks before the time" of their meeting, it was held that three insertions in three successive weeks, but within less than twenty-one days before the meeting, was not a compliance with the order;<sup>174</sup> and a statutory requirement of publication for three weeks successively, has been held to mean a publication for twenty-one days, and not satisfied by three insertions in three successive issues of a weekly paper, published, the last within sixteen days of the first.<sup>175</sup> There is said to be a difference, however, between a requirement of the kinds just referred to, and one that calls for publication "during a given number of successive weeks," or "by a given number of insertions in newspapers in successive weeks,"<sup>176</sup> not apparently contemplating publication of a certain duration before the doing of the act conditioned upon the notice thus provided. So, where a statute required publication of notice for six weeks successively, once in each week,<sup>177</sup> or for six successive

<sup>170</sup> See *Cinc. B'k v. Burkhardt*, 100 U. S. 686; *Cromelien v. Brink*, 29 Pa. St. 522, 526; *Hampton v. Erenzeller*, 2 Bro. (Pa.) 19; *Plowman v. Williams*, supra; *Neale v. Utz*, 75 Va. 480. And, as to commencement of statutes, see post, § 498, and of constitution, post, § 534.

<sup>171</sup> *Richards v. Fox*, 52 N. Y. Super. Ct. 36.

<sup>172</sup> *Re North Whitehall Tp.*, 47 Pa. St. 156, 161.

<sup>173</sup> *Ronkendorff v. Taylor*, 4 Pet. 361.

<sup>174</sup> *Re North Whitehall Tp.* supra, cit. *Early v. Homans*, 16 How. 610.

<sup>175</sup> *Loughridge v. Huntington*, 56 Ind. 253. And see *Meredith v. Chancey*, 59 Id. 466.

<sup>176</sup> *Re North Whitehall Tp.*, supra, at p. 160. *Comp. Build'g Ass'n v. Thompson*, 13 Phila. (Pa.) 511.

<sup>177</sup> *Olcott v. Robinson*, 21 N. Y. 150; *Wood v. Morehouse*, 45 Id. 368; and see *Sheldon v. Wright*, 7 Barb. (N. Y.) 39.

weeks," it was held that the notice was sufficient if published in six successive numbers of a weekly paper, though the first publication was less than six weeks before the event ;" nor, of course, does the fact, that, between the date of the first and that of the last appearance of the notice, the publication of the newspaper is changed from one day in the week to a subsequent day in the same week, affect its sufficiency.<sup>180</sup>]

§ 390. **Computation of Time.**—In the computation of time, distinctions have been made by the Courts which were founded chiefly on considerations of convenience and justice. The general rule, anciently, seems to have been that both terms or endings of the period given for doing or suffering something were included ; but when a penalty or forfeiture was involved in non-compliance with a condition within the given time, the time was reckoned by including one and excluding the other of the terminal days (*a*). A distinction was afterwards made, depending on whether the point from which the computation was to be made was an act to which the person against whom the time ran, was privy or not.<sup>181</sup> Thus, if the time ran from when he was arrested, or received a notice of action, it might justly be computed as including the day of that event ; but not so, if it ran from the death of another person (*b*) ; a fact of which he would not, as in the previous cases, necessarily be cognizant. But it has also been laid down that when a period of time allowed to a person is included between the dates of two acts to be done by another person, as where it is enacted that no action shall be brought against a justice until notice of the intention to bring it has been given to him a month before the writ is issued, both the terminal days are to be excluded (*c*). The notice having been given on the 28th of April, the action, it

<sup>178</sup> *Stoever's App.*, 3 Watts & S. (Pa.) 154.

<sup>179</sup> See, also, *Pearson v. Bradley*, 44 Ill. 250 ; *Fry v. Bidwell*, 74 Id. 381.

<sup>180</sup> *Stoever's App.*, *supra*.

(*a*) *De Morgan*, *Comp. Alm.* cited in *Sir G. C. Lewis' Obs. and Reas.* in *Politics*, 1, 387n.

<sup>181</sup> See *Hodgson v. Roth*, 33 La. An. 941.

(*c*) *Per Sir T. Grant* in *Lester v.*

*Garland*, 15 Ves. 247; *per Parke, B.*, in *Young v. Higgon*, 6 M. & W. 53; *Newman v. Hardwicke*, 3 Nev. & P. 368.

(*c*) *Per Alderson, B.*, in *Young v. Higgon*, 6 M. & W. 53. See *Pel-  
lew v. Wonford*, 9 B. & C. 194 ;  
*Blunt v. Heslop*, 3 Nev. & P. 553,  
8 A. & E. 124; *R. v. West Riding*,  
4 B. & Ad. 685; *Weeks v. Wray*,  
L. R. 3 Q. B. 312.

was held, was rightly brought on the 29th of May; what was requisite was that two days of the same number should not be comprised in the computation (*a*). [On the other hand, it was held in Pennsylvania, under a statute of entirely similar purport, that the proper rule was to include the first day and exclude the last,<sup>182</sup> so that, the notice having been given on May 19, suit was held properly commenced on June 18.<sup>183</sup> A distinction has also been drawn between the computation from and act done and from a particular day, in the former case the day upon which the act was done being included, in the latter excluded.<sup>184</sup> But this "shadowy distinction" has been said to be exploded,<sup>185</sup> while the difference between an act to be done before, and one to be done after the expiration of a given number of days, is said to be equally insubstantial.<sup>186</sup> However this may be, none of the distinctions indicated seem to have been generally in this country conceded to have much or controlling weight, and whilst the decisions cannot be said to be in perfect accord, the weight of authority seems to be, that one of the terminal days should be excluded,<sup>187</sup> and that, in general, this should be the first day.<sup>188</sup>

(*a*) *Freeman v. Read*, 4 B. & S. 174, 32 L. J. M. C. 226. See, also, *Webb v. Fairmanner*, 3 M. & W. 473; *R. v. Price*, 8 Moo. P. C. 203; *Migotti v. Colville*, 4 C. P. D. 233, 48 L. J. 695; *Re Southam*, 19 Ch. D. 169, 51 L. J. 207.

<sup>182</sup> *Thomas v. Afflick*, 16 Pa. St. 14.

<sup>183</sup> *Ibid.*

<sup>184</sup> *Castle v. Burdett*, 3 T. R. 623; *Arnold v. U. S.*, 9 Cranch, 104; *Atkins v. Sleeper*, 7 Allen (Mass.) 487; *Handley v. Cunningham*, 12 Bush (Ky.) 402.

<sup>185</sup> *Cromelien v. Brink*, 29 Pa. St. 522, 524.

<sup>186</sup> See *Thomas v. Afflick*, *supra*, at p. 15.

<sup>187</sup> *Stebbins v. Anthony*, 5 Col. 348; *Com'th v. Maxwell*, 27 Pa. St. 444.

<sup>188</sup> See *Columbia Turnp. Road v. Haywood*, 10 Wend. (N. Y.) 422; *Misch v. Mayhew*, 51 Cal. 514 (three days); *Brown v. Buzon*, 24 Ind. 194; *Catterlin v. Frankfort*, 87 Id. 45;

*Reigelsberger v. Stapp*, 91 Id. 311; *Kerr v. Haverstick*, 94 Id. 178; *Beckwith v. Douglas*, 25 Kan. 229; *English v. Williamson*, 34 Id. 212; *Cable v. Coates*, 36 Id. 191; *White v. German Ins. Co.* 15 Neb. 660; *McGavock v. Pollack*, 13 Id. 535; *Cook v. Moore*, 95 N. C. 1; and see *Walsh v. Boyle*, 30 Md. 262. This was the rule in Pennsylvania, under *Goswiler's Est.* 3 Pen. & W. 200; but this case was overruled by *Thomas v. Afflick*, *supra*, and *Barber v. Chandler*, 17 Pa. St. 48, the decisions in which were regretted in *Cromelien v. Brink*, *supra*, at pp. 524, 525. By act of assembly, however, of 20 June, 1883, the rule in *Goswiler's Est.* is re-instated: *Edmundson v. Wragg*, 104 Pa. St. 500. In support of the same rule are cited, in *Cromelien v. Brink*, *supra*, at p. 525, the following cases: *Homan v. Liswell*, 6 Cow. (N. Y.) 659; *Exp. Dean*, 2 Id. 605; *Cornell v. Moulton*, 3 Denio (N. Y.) 12; *People v.*

§ 391. [A few generally recurring phrases may be noticed here. Where time is to be computed "from" or "after" the day of a given date—and there is said to be no difference between "from the date" and "from the day of the date"<sup>189</sup>—that day is, in general, to be excluded from the computation.<sup>190</sup>

[Where a statute required thirty days' publication "before" the day of sale, the day of publication was held to be included in the computation.<sup>191</sup> So, where the requirement was three months' service "previous" to the first day of the term.<sup>192</sup> But under an act requiring notices to be posted four weeks "previous" to the day of sale, a sale on May 14, the notice having been posted on April 16, was held premature.<sup>193</sup>

[An order requiring the filing of a bill of exceptions, etc., "by" a certain date, was held complied with by filing it on that date.<sup>194</sup>]

Again, when so many "clear days" (a), or so many days "at least" (b), are given to do an act, or "not less than" so many days are to intervene, both the terminal days are excluded from the computation. [And so, where an act required thirty days' notice of a tax sale, and provided that "said day of sale shall be after the expiration of thirty days' notice," it was held that both the day of giving notice, or of

Sheriff, 19 Wend. (N. Y.) 87; Portland B'k v. Maine B'k, 11 Mass. 204; Bigelow v. Wilson, 1 Pick. (Mass.) 485; Varin v. Edmonson, 10 Ill. 270; Weeks v. Hull, 19 Conn. 376; Carson v. Love, 8 Yerg. (Tenn.) 315.

<sup>189</sup> See Pugh v. Duke of Leeds, Cowp. 714; Cromelien v. Brink, 29 Pa. St. 522, 524.

<sup>190</sup> See Bemis v. Leonard, 118 Mass. 502; Good v. Webb, 52 Ala. 452; Wood v. Com'th, 11 Bush (Ky.) 220; Handley v. Cunningham, 12 Id. 402; Bish., Wr. L., § 31a; post, § 498.

<sup>191</sup> Northrop v. Cooper, 23 Kan. 432.

<sup>192</sup> English v. Ozburn, 59 Ga. 392.

<sup>193</sup> Ward v. Walters, 63 Wis. 39. And see Dousman v. O'Malley, 1 Dougl. (Mich.) 450, where, under a statute requiring that process should be served a certain number

of days before the return day, both the day of service and that of return were held excluded, the former by the rule of construction prescribed by Rev. St. 3, § 3, subd. 11, and the latter by the terms of the act. And see O'Connor v. Towns, 1 Tex. 107.

<sup>194</sup> Higley v. Gilmer, 3 Montana, 433. A statute authorizing plaintiff to take a judgment by default on the third Saturday following the return day of the original writ, unless an affidavit of defence be "previously" filed by defendant, is held to give the latter the whole of the third Saturday for the filing of the affidavit: Gillespie v. Smith, 13 Pa. St. 65. See Endlich, Aff. of Def., §§ 349-353.

(a) Liffen v. Pitcher, 6 Dowl. N. S. 767.

(b) Zouch v. Empsey, 4 B. & A. 522; R v. Salop, 8 A. & E. 173.



first publication, and the day of sale were to be excluded.<sup>195</sup> On the other hand, under a statutory provision requiring, in courts whose terms were held oftener than twice a year, a space of at least twelve months to intervene between the term at which a suit was returned and that at which judgment was entered therein, a judgment rendered at a term commencing February 10, 1868, in a suit which was returned to a term commencing February 11, 1867, was sustained.<sup>196</sup> And a provision of the New York Code directing service of citations from the Surrogate's Court "at least eight days before the return day thereof" was held controlled by another provision of the same code providing that the time within which an act is required by law to be done is to be computed by excluding the first and including the last day; and consequently service, on the twelfth of the month, of a citation returnable on the twentieth, was held sufficient.<sup>197</sup>

§ 392. [When any matter is required to be done "within" a certain number of days, the day that is the starting point is excluded.<sup>198</sup> Thus, under an act allowing lands sold for taxes to be redeemed within two years, a redemption on June 10, 1852, of lands sold on June 10, 1850, was in time.<sup>199</sup> So, where the time prescribed for redeeming a right in equity sold on execution was "within one year next after the time" of the execution of the deed to the purchaser, the day on which the deed was executed was excluded.<sup>200</sup> The three months, given by statute, after the expiration of a year, within which a debtor might redeem lands sold on execution, were held to begin running on the day succeeding the expiration of the year.<sup>201</sup> A delinquent tax list filed July 4,

<sup>195</sup> *Steuart v. Meyer*, 54 Md. 454.

<sup>196</sup> *Manning v. Kohn*, 44 Ala. 343.

<sup>197</sup> *Re Carhart*, 2 Demarest (N. Y.) 627; 67 How. Pr. 216. And see *State v. Gasconade*, 33 Mo. 102.

<sup>198</sup> *Thorne v. Mosher*, 20 N. J. Eq. 257; *Barcroft v. Roberts*, 92 N. C. 249, and cases *infra*.

<sup>199</sup> *Cromelien v. Brink*, 29 Pa. St. 522.

<sup>200</sup> *Bigelow v. Wilson*, 1 Pick. (Mass.) 485.

<sup>201</sup> *People v. Sheriff*, 19 Wend.

(N. Y.) 87. See, to same effect, as to the right, to appeal "within" thirty days: *Gallt v. Finch*, 24 How. Pr. (N. Y.) 193. But see the controlling statutory provision, ante, § 392, *Re Carhart*, 2 Demarest, 627. So, under a requirement to pay an assessment within a certain number of days after notice, the day on which notice reaches the party is excluded: *Protect'n Life Ins. Co. v. Palmer*, 81 Ill. 88. And as to right of appeal within 10 days, see *Hursh v. Hursh*, 99 Ind. 500.

is filed within five days of the beginning of a term commencing on July 9;<sup>202</sup> and where a city ordinance permits hogs taken up to be redeemed within five days, the day on which they are taken is not to be counted.<sup>203</sup> So, under an act permitting a party arrested on execution to give bond conditioned for his taking, within one year from the day of his arrest, the poor debtors' oath, or, in default thereof, to surrender himself, on the next day after the expiration of the year, to the keeper of the jail, the day of arrest was held to be excluded; so that, after an arrest on November 22, of one year, a surrender on November 23 of the next year satisfied the condition.<sup>204</sup> Under an act requiring a person desirous of contesting an election, to file his reasons with the county clerk "within thirty days" after the election, a filing within the last twenty-four hours, though after the prescribed office hours, was held sufficient.<sup>205</sup>]

A continuing act, such as trespass or imprisonment, dates, in the computation of the time allowed for bringing an action in respect of it, from the day of its termination (*a*). So, a bankrupt remaining abroad with intent to defeat his creditors commits a fresh act of bankruptcy every day (*b*).

§ 393. Sundays are included in computations of time, except when the time is limited to twenty-four hours, in which case the following day is allowed (*c*). Thus, where

<sup>202</sup> *Prior v. People*, 107 Ill. 628.

<sup>203</sup> *White v. Haworth*, 21 Mo. App. 439.

<sup>204</sup> *Odiorne v. Quimby*, 11 N. H. 224. *Comp. Henry v. Carson*, 59 Pa. St. 297, as to the meaning of the phrase "die within ten years," as "inside of ten years."

<sup>205</sup> *Zimmerman v. Cowan*, 107 Ill. 631, the direction in the statute requiring the clerk to keep his office open from 8 A.M. to 6 P.M., being held merely to make this a minimum requirement, and not to affect his right or power to do business during any other hours of the day. See ante, § 365, note.

(*a*) *Massy v. Johnson*, 12 East, 67; *Hardy v. Ryle*, 9 B. & C. 608; *Collins v. Rose*, 5 M. & W. 194; *Pease v. Chaytor*, 3 B. & S. 620;

*Whitehouse v. Fellowes*, 10 C. B. N. S. 765. See, however, *Wallace v. Blackwell*, 8 Drew. 538; *Eggington v. Lichfield*, 5 E. & B. 100, 24 L. J. 360. As to continuing nuisance, see cases in *Battishill v. Reed*, 18 C. B. 896, 25 L. J. 290, and *Whitehouse v. Fellowes*, 10 C. B. N. S. 765, 30 L. J. 805. *Encroachment, Coggins v. Bennett*, 2 C. P. D. 508.

(*b*) *Exp. Bunny*, 1 De Gex & J. 309, 26 L. J. Bcy. 83. [*Comp. Schepp v. Reading*, 2 Woodw. (Pa.) 460, ante, § 353, note.]

(*c*) *Burn's J., Tit. Lord's Day* [Bish., Wr. L., § 110c: "Where . . . the law gives a certain number of hours for the performance of an act, those even of an intervening Sunday are to be left out from the

an Act required that a recognizance should be entered into in two days after notice of appeal, and the notice was given on a Friday, it was held that recognizances on the following Monday were too late; though Sunday was the last day, and they could not be entered into then (*a*). Of course, when an Act expressly excludes Sunday, the days given for doing an act are working days only (*b*). [It is said,<sup>206</sup> however, in this country, that, to some extent, Sundays are excluded even where the time given is measured by days, especially where their number is less than a week;<sup>207</sup> as where a city charter required six days' publication of notice of the filing of the assessment roll;<sup>208</sup> or where an act required justices of the peace to render judgment in three days;<sup>209</sup> or gave four days for the entry of an appeal,<sup>210</sup> or made a short summons from a justice's court returnable in two days.<sup>211</sup> But where the period is a longer one, intervening Sundays are, in general, to be counted in.<sup>212</sup> Nor does a statutory provision, that, where the last day falls upon Sunday it is to be excluded, change this rule as to intervening Sundays.<sup>213</sup> The rule, that, where the last of a certain number of days allowed for the doing of an act falls on Sunday, the act may be done on the next day,<sup>214</sup> has been by statute, in many states, made

count; the person being allowed hours wherein it is lawful to act,"—citing *Meng v. Winkleman*, 43 Wis. 41; *Com'th v. Intox. Liquors*, 97 Mass. 601, etc.; but referring to *Franklin v. Holden*, 7 R. I. 215.]

(*a*) *Exp. Simpkins*, 2 E. & E. 392, 29 L. J., M. C. 23; *Peacock v. Reg.*, 4 C. B. N. S. 264, 27 L. J. 224.

(*b*) *Pease v. Norwood*, L. R. 4 C. P. 235; *Exp. Hicks*, 20 Eq. 143.

<sup>206</sup> *Bish., Wr. L.*, § 110c.

<sup>207</sup> See *Chicago v. Iron Works*, 93 Ill. 222, and other cases cited in *Bish., Wr. L.*, § 110c, note 4.

<sup>208</sup> *Chicago v. Iron Works*, *supra*.

<sup>209</sup> *Hodgson v. Bank'g House*, 9 Mo. App. 24.

<sup>210</sup> *Neal v. Crew*, 12 Ga. 93.

<sup>211</sup> *Simonson v. Durfee*, 50 Mich. 80. But see *Cressey v. Parks*, 75 Me. 387, where, under a

statute providing for the sale of property seized for taxes, after being kept four days, it was held that the day of seizure should be excluded, but an intervening Sunday included, and the property sold on the fourth day unless that fell upon Sunday, when it must be sold on the next day.

<sup>212</sup> *Conklin v. Marshalltown*, 66 Iowa. 122; *Goswiler's Est.*, 3 Pen. & W. (Pa.) 200; *Edmundson v. Wragg*, 104 Pa. St. 500; *Bish., Wr. L.*, § 110c, and cases there cited in note 6. Not, however, it seems in Missouri: See *Kellogg v. Carrico*, 47 Mo. 157; *Nat'l B'k v. Williams*, 46 Mo. 17; see, also, *State v. Judge*, 29 La. An. 223, and comp. *Pierce v. Cushing*, 33 Id. 401.

<sup>213</sup> *Nat'l B'k v. Williams*, *supra*.

<sup>214</sup> Negotiable paper is an exception to this rule: *Edmundson v. Wragg*, 104 Pa. St. 500, 503.

a rule of statutory construction ;<sup>215</sup> but it appears, even without such distinct enactment, to be very generally recognized as such.<sup>216</sup>]

§ 394. **Periodical Recurrences.**—If the statute require some act to be done periodically and recurrently once in a certain space of time, as, for instance, the inspection of the boilers of steamers once in six months, it would probably be understood to mean that not more than six months should elapse between the two acts. It would not be satisfied by dividing the year into two equal periods, and doing the act once in the beginning of the first, and once at the end of the second period (*a*). An Act which imposed a penalty for absence for more than a certain time in any one year, means not a calendar year computed from the first of January, but a year computed back from the day when the action for the penalty was brought (*b*).

§ 395. **Computation of Distances.**—Distances were formerly measured by the nearest and most usual road or way (*c*); and this is undoubtedly the popular manner of measuring them (*d*). But if the nearest practicable mode of access were adopted, should it be a carriage-way, or a bridle path, or a footpath? If the way were by a tidal river, the distance might vary every hour of the day (*e*). Where there is nothing in the statute to lead to one construction or to another, convenience alone is the guide in such a question (*f*). It is to be presumed that the Legislature intends the

<sup>215</sup> See, *e. g.*, *Brainard v. Norton*, 14 Ill. App. 643.

<sup>216</sup> See *Gibbon v. Freel*, 65 How. Pr. (N. Y.) 273; *Goswiler's Est.*, supra; *Edmundson v. Wragg*, supra; *Cressey v. Parks*, 75 Me. 387; *English v. Williamson*, 84 Kan. 212. But see contra, *Adams v. Dohrmann*, 63 Cal. 417.

(*a*) *Virginia & Maryland St. Nav. Co. v. U. S.*, Taney & Campbell's Maryland Rep. 418.

(*b*) *Cathcart v. Hardy*, 2 M. & S. 533.

(*c*) 1 Hawk. s. 15. Comp. 23 L. J. C. P. 144n.

(*d*) *Per Coleridge, J.*, in *Lake v. Butler*, 5 E. & B. 92, 24 L. J. 273. [The Pennsylvania Act 19 May, 1887, P. L. 134, provides for computation of mileage for jurors, witnesses, etc., to the county seat by the route usually traveled in going from the places where they reside, whether by public highways, railroads, or otherwise, restricting, however, the mileage to the number of miles actually traveled.]

(*e*) *Per Lord Campbell*, *Ibid.*

(*f*) *Per Erle, J.*, *Ibid.*

most convenient and certain mode of measurement, and that is unquestionably as the crow flies ; a straight line on a horizontal plane, between the nearest points of the two places or objects (*a*).

(*a*) *Lake v. Butler*, ubi sup.;  
*Stokes v. Grissell*, 14 C. B. 678, 23  
L. J. 141; *Jewell v. Stead*, 6 E. &  
B. 350, 25 L. J. 294; *R. v. Saffron*  
*Walden*, 9 Q. B. 76; *Duignan v.*

*Walker*, 1 Johns. 446, 28 L. J. Ch.  
867; *Mouffet v. Cole*, L. R. 8 Ex.  
83. See *Coulbert v. Troke*, 1 Q.  
B. D. 1.

## CHAPTER XIV.

## ASSOCIATED WORDS.

§ 396. Restrictive effect of Association of General and Specific Words.

§ 397. Expressio Unius est exclusio alterius.

§ 400. Noscuntur a Sociis.

§ 404. Extending Effect of Association of Words.

§ 405. Rule as to Generic Words added to Specific.

§ 412. Rule that Inferior does not include Superior.

§ 414. Several Words followed by a General Expression.

§ 415. General Expression in Middle of Clause.

§ 416. Reddendum Singula Singulis.

§ 396. **Restrictive Effect of Association of General and Specific Words.**—When two words or expressions are coupled together, one of which generically includes the other, it is obvious that the more general term is used in a meaning excluding the specific one. Though the words “cows,” “sheep,” and “horses,” for example, standing alone, comprehend heifers, lambs, and ponies respectively, they would be understood as excluding them if the latter words were coupled with them (*a*). The word “land,” which in its ordinary legal acceptation includes buildings standing upon it, is evidently used as excluding them, when it is coupled with the word “buildings” (*b*). If after imposing a rate on houses, buildings, works, tenements and hereditaments, an Act exempted “land,” this word would be restricted to land unburthened with houses, buildings, or works; which would otherwise have been unnecessarily enumerated (*c*). In the 43 Eliz. c. 43, which imposed a poor rate on the occupiers of “lands,” houses, tithes and “coal-mines,” the same word was similarly limited in meaning as not including mines (*d*).

(*a*) R. v. Cooke, 2 East, P. C. 617; R. v. Loom, 1 Moo. C. C. 160.

(*b*) See ex. gr. Dewhurst v. Fielding, 7 M. & Gr. 182; Peto v.

West Ham, 2 E. & E. 144, 28 L. J. M. C. 240.

(*c*) R. v. Midland R. Co., 4 E. & B. 953.

(*d*) Lead Smelting Co. v. Richard-

The mention of one kind of mine shows that the Legislature understood the word "land," which in law comprehends all mines, as not including any. [So, where an act imposed certain taxation upon "every company or association whatever . . . except foreign insurances companies, banks and savings institutions," it was held, in denying the benefit of this exemption to building associations, as a species of savings institutions, that the legislative sense of the latter phrase as excluding building associations was clearly established by reference to other acts in *pari materia*, which, when intending to exempt building associations as well as the other institutions named, expressly mentioned the former, in addition to savings institutions; as, *e. g.*, "and excepting also banks and savings institutions, building associations and foreign insurance companies,"—the court observing: "If the two classes were the same, of course they would not receive separate designations." And this construction was insisted upon, although, by it, the act referred to was made to repeal by implication an act passed at the same session of the Legislature, not two months previously, specifically exempting building associations from taxation.\*] In the same way, although the word "person," in the abstract, includes artificial persons, that is, corporations (*a*), the Statute of Uses which enacts that when a "person" stands seized of tenements to the use of another "person or body corporate," the latter "person or body" shall be deemed to be seized of them, is understood as using the word "person" in the former part of the sentence as not including a body corporate. Consequently, the statute does not apply where the legal seizin is in a corporation (*b*). The same construction was

son, 3 Burr. 1341; *R. v. Sedgley*, 2 B. & Ad. 65; *R. v. Cunningham*, 5 East, 478; *Morgan v. Crawshay*, L. R. 5 H. L. 304.

<sup>1</sup> *Bourignon Bld'g Ass'n v. Com'th*, 98 Pa. St. 54, 65.

<sup>2</sup> See *Ibid*.

(*a*) 2 Inst. 722; [*ante*, §§ 87-90.] See, however, *Weavers' Co. v. Forest*, 2 Stra. 1241; *Harrison's Case*, 1 Leach, 215; *St. Leonards'*

*v. Franklin*, 3 C. P. D. 337, 47 L. J. 727; *Pharmaceutical Society v. London, etc., Supply Assoc.*, 5 App. 867. As to foreign corporations, *Ingate v. Austrian Lloyd's Co.*, 4 C. B. N. S. 704; *Scott v. Royal Wax Co.*, 1 Q. B. D. 404; *Royal Mail Co. v. Braham*, 2 App. 381. [*Ante*, § 89.]

(*b*) *Bac. Reading Stat. Uses*, 43, 57.

given, for the same reason, to the same word in the Mortmain Act, 9 Geo. 2, c. 36 (a).

§ 397. **Expressio Unius, etc.**—It is in this sense that the maxim, occasionally misapplied in argument (b), *expressio unius est exclusio alterius*, finds its true application. [Thus, where an act had given to courts of common pleas equity jurisdiction in a particular class of accounts, and a subsequent act conferred upon them chancery jurisdiction on the grounds of fraud, accident, mistake and account, it was held that the latter act, though broad enough to include all cases of account, should be understood as relating to accounts not within the former, and hence as not working a repeal thereof.\* The maxim in question, as applied to the construction of statutes, certainly cannot mean, that, where one thing is allowed or named, every other thing is forbidden or excluded. It has, indeed, been said, that an exception made by the statute itself excludes all other exceptions;† that, where a statute specifies the effect of a certain provision, other effects are to be held excluded,‡ as, where an act repeals expressly a particular portion or section of another, there can be no implied repeal beyond that;§ that an enumeration of cases in which, *e. g.*, interest may be recovered excludes such recovery in others;¶ that a power given to national banks of loaning money on personal security, excludes the power of taking any other, *e. g.*, mortgages;‡ that an act affirming jurisdiction in the supreme court of the United

(a) Walker v. Richardson, 2 M. & W. 883.

(b) Sup. § 374. See Feather v. R., 6 B. & S. 257, 39 L. J. 200; Eastern Archip. Co. v. R., 1 E. & B. 310, 23 L. J. 82, *per* Creswell, J., 96; London Joint Stock Bank v. M. of London, 1 C. P. D. 1, 17.

§ Dick's App., 106 Pa. St. 589, 595.

§ Brocket v. R. R. Co., 14 Pa. St. 241, 243; Miller v. Kirkpatrick, 29 Id. 226; Olive Cem'y Co. v. Philadelphia, 93 Id. 129; Dryfus v. Bridges, 45 Miss. 247; McRoberts v. Washburn, 10 Minn. 23. Upon this theory would seem to rest the application of the maxim to exceptions made by statutes to

the common law rule forbidding suits between husband and wife: "the Legislature has undertaken to enumerate the cases in which she may sue, and all others are omitted; *expressio unius exclusio est alterius*, is a sound legal maxim." Miller v. Miller, 44 Pa. St. 170, 172.

§ Perkins v. Thornburgh, 10 Cal. 189.

§ State v. Morrow, 26 Mo. 131; Purcell v. Ins. Co., 42 N. Y. Super. Ct. 383. Ante, §§ 203, 206.

§ Watkins v. Wassell, 20 Ark. 410.

§ Fowler v. Scully, 72 Pa. St. 456, 461.



States is to be construed as a negation of jurisdiction in all cases not expressly enumerated;<sup>9</sup> and that a penal statute designating as subject to its penalties a particular class of persons, exonerates all not belonging to such class.<sup>10</sup>

§ 398. [But, on the one hand, these decisions, so far as they are accurate, may be readily accounted for on the familiar doctrines, that, "as exceptions strengthen the force of a general law, so enumeration weakens as to things not enumerated;"<sup>11</sup> that an affirmative may imply a negative and may so operate where the intention of the Legislature to give it that effect is ascertained; that, the question of a specified effect being one of implied intention, an express declaration of the effect an act is intended to have leaves no room for any further implication;<sup>12</sup> or on the ground of strict construction applicable to the class of statutes embracing that upon which the rule is supposed to operate, *e. g.*, statutes granting powers to corporations,<sup>13</sup> or penal statutes.<sup>14</sup> And, on the other hand, if there is such a rule, it is

<sup>9</sup> Exp. McCardle, 7 Wall. 506; so that a repeal of such an act is a denial of jurisdiction even in those cases. See, also, Exp. Yerger, 8 Wall. 85.

<sup>10</sup> State v. Jaeger, 63 Mo. 403; hence, in this case, a wine grower was held not indictable for selling wine on his own premises without a license, or permitting it to be drank at such place: *Ib.* See, also, Niemeyer v. Wright, 75 Va. 239, post, § 455, note, that the infliction of a forfeiture in one aspect is its exclusion in any other; and comp. Howell v. Stewart, 54 Id. 400. See, also, Bish., *Wr. L.*, § 249, and cases there cited. In *Hankins v. People*, 106 Ill. 628, it was held, upon the principle, *exclusio unius, etc.*, that an exclusion of power to impose a fine of less than \$100, by implication gave the power to impose a fine of more than \$100, the language directing the imposition of a fine of not less than \$100, and fines above the minimum being under the laws of Illinois reviewable. As cited in that decision, a statute punishing murder in the second degree with imprisonment

for not less than five years was held to justify a sentence to imprisonment for life: *Drake v. State*, 5 Tex. App. 649, and for sixty years: *Childs v. State*, 2 Id. 36. But in *Stinson v. Pond*, 2 Curt. 502, a statute prohibiting an act under penalty of not less than \$100, was held to limit the recovery to that sum.

<sup>11</sup> See *Page v. Allen*, 58 Pa. St. 338, 346.

<sup>12</sup> See ante, §§ 199-202, 203.

<sup>13</sup> See *Fowler v. Scully*, supra, citing, to the effect, that, in such, what is not expressly or by necessary implication, given, is to be deemed as expressly withheld: *B'k of U. S. v. Dandridge*, 12 Wheat. 64; *Head v. Ins. Co.*, 2 Cranch, 127; *Dartmouth Coll. v. Woodward*, 4 Wheat. 636; *B'k of Augusta v. Earle*, 13 Pet. 587; *Perrine v. Canal Co.*, 9 How. 184; *Venango Nat. B'k v. Taylor*, 56 Pa. St. 14. See ante, § 354, post, § 418.

<sup>14</sup> See *State v. Jaeger*, 63 Mo. 403, where it is said that the rule of strict construction required the effect given to the act: supra, § 397.

confessedly liable to so many restrictions and exceptions in its application as to be practically swept away. Indeed, the extreme caution necessary in its application is emphasized wherever it is recognized by writers.<sup>15</sup> Even as to penal statutes, it is said to be too general and subject to too many exceptions to govern the construction.<sup>16</sup> So the rule that the repeal of particular statutes, or of a portion of an act, shall exclude the implication of a repeal of other statutes of the same purport, or of other provisions of the act,<sup>17</sup> is narrowed by the other, that, if a statute was evidently omitted from the enumeration by an oversight, it will nevertheless be repealed,<sup>18</sup> and by the condition that other provisions not expressly repealed be not absolutely inconsistent with the later act,<sup>19</sup> which practically obliterates the former rule; for such inconsistency is always requisite in order to permit a repeal by implication.<sup>20</sup> Nor, conversely, does the mere enumeration in one statute of certain provisions in another as not to be affected by it warrant an inference that all other existing provisions on the subject, not referred to in the enumeration, are repealed.<sup>21</sup> And, in general, if there is some special reason for mentioning one thing in a statute, and none for mentioning another, the expression of the former will not be an exclusion of the other.<sup>22</sup> A statutory provision declaring a married woman, when a party to an action, empowered to enter into any necessary bond or undertaking, does not impair her right to become a

<sup>15</sup> See Bish., *Wr. L.*, § 249a; Broom, *Leg. Max.*, p. 653. See this caution insisted upon in *Taylor v. Taylor*, 10 Minn. 107, 113.

<sup>16</sup> *State v. Connor*, 7 La. An. 379.

<sup>17</sup> *Ante*, § 397.

<sup>18</sup> *New York v. R. R. Co.*, 19 N. Y. Super. Ct. 571; and see *U. S. v. Cheeseman*, 3 Sawyer, 424. *Ante*, § 203.

<sup>19</sup> *Crosby v. Patch*, 18 Cal. 438.

<sup>20</sup> *Ante*, §§ 210 et seq. See, also, *Ætna Ins. Co. v. Reading*, 21 W. N. C. (Pa.) 209, where a provision of the general municipal law of 1887, giving certain cities the

right to impose license taxes upon insurance companies, was held to repeal, by implication, the exemption enacted by an act of 1873 in favor of such companies; notwithstanding the circumstance (urged upon argument) that the act of 1887 contained a special repealing clause, repealing expressly all former municipal laws, special and general, inconsistent with, or supplied by, the provisions of the act of 1887.

<sup>21</sup> *Burnham v. Onderdonk*, 41 N. Y. 425.

<sup>22</sup> *Brown v. Buzan*, 24 Ind. 194.

surety in an undertaking upon appeal by another person ;<sup>22</sup> nor does one declaring that the failure to give a certain prescribed notice shall not invalidate an election imply that every other prescribed formality must be rigidly observed in order to its validity ;<sup>23</sup> nor one prescribing that certain enumerated acts, such as filing a demurrer, answer, etc., shall be deemed an appearance by the defendant in a cause, that other acts, *e. g.*, filing an affidavit for a continuance, should not be treated as an appearance.<sup>24</sup> Indeed, the exceptions would more than swallow up the rule ; for, under it, there could be no such thing as implication or liberal construction ; nor could there be any cumulative remedies where a statute undertakes to give a remedy.<sup>25</sup>

§ 399. [Whether the expression of one thing is to operate as the exclusion of another, is clearly a mere question of intention, to be gathered from the statute by the usual means and rules of interpretation. As an auxiliary rule, the maxim, *expresio unius*, etc., as above defined becomes a most important aid. It means that the special mention of one thing indicates that it was not intended to be covered by a general provision which would otherwise include it. The cases given<sup>26</sup> are instances of the application of the rule to mere words. But it extends beyond that, and applies to clauses as well. Thus, where a repealing statute contains a special saving clause, the general saving clause of the general statute has no application, and no rights or remedies are saved, except such as come within the special saving clause.<sup>27</sup> Where one section of an act, being a charter for a city, gave a specific and detailed remedy for the collection of assessments and declared the provision applicable to the

<sup>22</sup> Woolsey v. Brown, 74 N. Y. 82. Comp. ante, § 374.

<sup>23</sup> Taylor v. Taylor, 10 Minn. 107.

<sup>24</sup> State v. McCullough, 3 Nev. 202. The statute was construed to mean only that the acts enumerated should be an appearance so as to entitle the defendant to notice of further steps ; *Ib.* See, also, ante, §§ 210-214.

<sup>25</sup> See Bish., Wr. L., § 249.

And see Dow v. Young, (Me.) 4 New Engl. Rep. 503, 504, where it is said that the principle "*Expresio unius est exclusio alterius* supports the rule," that, when a statute creates a right and declares *when* it may be exercised, it cannot be exercised at any other time. See § 433.

<sup>26</sup> Ante, § 396.

<sup>27</sup> State v. Showers, 34 Kan. 260.

collection of those due and unpaid at the passage of the act, and a subsequent section provided that "nothing in said act contained shall be construed to destroy, impair, or take away any right or remedy acquired or given by any act thereby repealed," it was clear that the broad expressions of the latter section could not include the matters specifically provided for in the former, but applied only to preserve contract rights against the city.<sup>30</sup> It applies, indeed, wherever an act contains general provisions and also special ones upon a subject, which, standing alone, the general provisions would include. In such cases, the special provisions upon that particular subject indicate an intention that it is not to be deemed included in the general provision, and the latter is held inapplicable to it, or, as is sometimes said, is controlled by the special provisions. Where, therefore, there is, in the same statute, a particular enactment, and also a general one, which, in its most comprehensive sense, would include what is embraced in the former, the particular enactment must be operative, and the general enactment must be taken to affect only such cases within its general language as are not within the provisions of the particular enactment.<sup>31</sup> It follows, that, where an act, in one set of provisions, gives specific and precise directions to do a particular thing, and in another set, prohibits, in general terms, the doing of that, which, in the broad sense of the words used in the latter, would cover the particular act authorized by the former, the more general provisions cannot be deemed to include the matters embraced in the more specific ones.<sup>32</sup> And the same is true as to portions of an act treating exclusively and in detail of a matter that is only incidentally referred to in other sections of the statute; the former provisions must prevail.<sup>33</sup>]

<sup>30</sup> State v. Trenton, 38 N. J. L. 64.

<sup>31</sup> Pretty v. Solly, 26 Beav. 610, *per* Romilly, M. R.; State v. Comm'rs of R. R. Tax'n, 37 N. J. L. 228. The effect of this rule is practically that general legislation on a particular subject must give way to special legislation on the same: State v. Clark, 25 Id. 54; State v. Morristown, 33 Id. 61;

ante, §§ 215-216.

<sup>32</sup> State v. Trenton, 38 N. J. L. 64.

<sup>33</sup> Long v. Culp, 14 Kan. 412. Of course, where there is any apparent discrepancy between general and particular provisions of an act, an harmonization of the two should first be aimed at: State v. Comm'rs of R. R. Tax'n, 37 N. J. L. 228.

§ 400. *Noscuntur a Sociis*.—When two or more words, susceptible of analogous meaning, are coupled together, *noscuntur a sociis*. [Where the language of the act itself points to the associated words as interpreting the more general ones, the application of the rule is obvious. Thus, where an act imposes a tax upon all real estate, to wit, upon various specified kinds of real estate, and from such specification shown to be private property, it is clear that the general words are to be controlled by the specifications, and that the broad phrase embracing all real estate, nevertheless does not include property, *e. g.*, of the United States within the territory to which the tax applies.<sup>23</sup> But, even in the absence of such a clear manifestation of intent, associated words] are understood to be used in their cognate sense. They take, as it were, their color from each other; that is, the more general is restricted to a sense analogous to the less general. The expression, for instance, of “places of public resort,” assumes a very different meaning when coupled with “roads and streets,” from that which it would have if the accompanying expression was “houses” (*a*). In an enactment respecting houses “for public refreshment, resort and entertainment,” the last word was understood, not as a theatrical or musical or other similar performance, but as something contributing to the enjoyment of the “refreshment” (*b*). An Act which exempted “magnates and noblemen” from tithes, was held, on this ground, not to extend to an ecclesiastical magnate, such as a dean, but to apply only to magnates of a “noble” kind (*c*). In the same way, the 17th section of the Statute of Frauds, which requires that contracts for the sale of “goods, wares, and merchandise” for ten pounds or upwards, shall be in writing, and the Factors Act, 5 & 6

<sup>23</sup> U. S. v. Weise, 2 Wall. Jr. 72.

(*a*) See *ex. gr.* R. v. Jones, 7 Ex. 586, 21 L. J. M. C. 113; R. v. Brown, *Id.* 116, and 17 Q. B. 833; *Exp. Freestone*, 25 L. J. M. C. 121; *Davys v. Douglas*, 4 H. & N. 180, 28 L. J. M. C. 193; *Sewell v. Taylor*, 29 *Id.* 50, 7 C. B. N. S. 160; *Case v. Storey*, L. R. 4 Ex. 319; *Skinner v. Usher*, L. R. 7 Q.

B. 423. See, also, *R. v. Charlesworth*, 2 L. M. & P. 117; *Wilson v. Halifax*, L. R. 3 Ex. 114.

(*b*) *Muir v. Keay*, L. R. 10 Q. B. 594. See *Taylor v. Oram*, 1 H. & C. 370; *Howes v. Inland Revenue Bd.*, 1 Ex. D. 385; *R. v. Tucker*, 2 Q. B. D. 417.

(*c*) *Warden v. Dean of St. Paul's*, 4 Price, 65.

Vict. c. 39, which protects certain dealings of agents entrusted with the documents of title of "goods and merchandise," do not extend to shares or stock in companies (*a*), or to the certificates of them (*b*). In each of these cases, the meaning of the more general word is in a measure derived from, or at least limited by, the more specific one with which it is associated. The Bankrupt Act, which makes a fraudulent "gift, delivery, or transfer" of property an act of bankruptcy, includes only such deliveries or transfers as are of the nature of a gift; that is, such only as alter the ownership of the property; but it does not include a delivery to a bailee for safety custody (*c*). [So, where an act gave a lien to mechanics upon "all improvements, engines, pumps, machinery, screens and fixtures, erected or put by tenants of leased estates on land of others," providing that the lien thereby created should extend only to the interest of the tenant, and to the "improvements, engines, pumps, machinery, screens and fixtures erected, repaired or put in" by such mechanics, it was held, that, although the word "improvements" was large enough, under ordinary circumstances, to include a house or private dwelling, it was manifest, by its connection, in the act, with the words "engines, pumps," etc., that the word was not intended to authorize the creation of liens upon ordinary houses or dwellings of tenants independently of the works indicated by the other expressions used in connection with the word "improvements.""]

§ 401. The receipt of "parochial relief or other alms," which disqualifies for the municipal franchise (5 & 6 Will. 4, c. 76, s. 9), is confined to other parochial alms, and does

(*a*) *Tempest v. Kilner*, 3 C. B. 249; *Bowlby v. Bell*, Id. 284; *Humble v. Mitchell*, 11 A. & E. 205; *Heseltine v. Siggers*, 1 Ex. 856.

(*b*) *Freeman v. Appleyard*, 32 L. J. Ex. 175. See *Judic. A.* 1875, Ord. 52, r. 2, and *Bartholomew v. Freeman*, 3 C. P. D. 316.

(*c*) *Cotton v. James, Moo. & Mal.* 273; *Bitt v. Beeston*, L. R. 4 Ex. 159.

<sup>1</sup>*Schenley's App.*, 70 Pa. St. 98. So, in construing the Pa. Act, 4 Apr. 1877, giving an appeal from

the refusal of the court of common pleas to open judgments entered by virtue of a "warrant of attorney or on judgment note," and holding it inapplicable to the case of a judgment confessed in an amicable action of ejectment, the Court said: "The use of the words 'warrant of attorney or judgment note' . . . makes it doubtful at least, whether the provisions of said act were intended to apply to any but money judgments:" *Limbert's App.*, 21 W. N. C. (Pa.) 20, *Reasserted in Swartz's App.* (Pa.) 11 *Centr. Rep.* 681.

not include alms received from a charitable institution (a). An Act (23 & 24 Vict.) which prohibits the sale of articles, as "pure or unadulterated," which are in fact adulterated or not pure, would be understood to use the latter expression as closely analogous to the former; so that milk from which the cream had been extracted would probably not fall within the designation of "not pure." (b). In the Thames Conservancy Act, which, after empowering the conservators to license the construction of jetties in the river, provided that this should not take away any "right," claim, privilege, franchise, or immunity to which the occupiers of land on the banks were entitled, the word "right," was limited by the associated words to vested rights of property, and did not include the right of navigation which the occupiers enjoyed not otherwise than the public generally (c). In the first section of the Prescription Act, the expression "any right of common" is similarly restricted by the succeeding words, "or other profit or benefit to be taken and enjoyed from or upon any land," so as not to include rights in gross, but only those usual rights of common and profit à prendre which are in some way appurtenant to the land, and limited to the wants of a dominant tenement (d). And in the second section of the same Act, relating to claims by custom, prescription or grant, "to any way or other easement," the

(a) *R. v. Lichfield*, 2 Q. B. 693. See the cases collected in *Harrison v. Carter*, 2 C. P. D. 26. [In *Gould v. Sub-District*, 7 Minn. 203, a saving of "contract, obligation, right, or lien" was held to include a claim or action *ex delicto*, it being observed that *rights* would arise from obligations and contracts, and would not probably extend beyond them, whilst *right* would seem to have a larger sense and indicate something more than surplusage.]

(b) The ordinary marine policy which insures against arrest of "kings, princes, and people," refers, under the last word, not to any collection of persons, but to the governing power of a country not included in the other terms with which it is associated: *Nesbitt v. Lushington*, 4 T. R. 783. See

*Johnston v. Hogg*, L. R. 10 Q. B. D. 432. See, also, *Davidson v. Burnand*, L. R. 4 C. P. 120; *Ashbury Carriage Co. v. Riche*, L. R. 7 H. L. 653; *Chartered Merc. Bank v. Wilson*, 3 Ex. D. 108; *Woodward v. London & N. W. R. Co.*, Id. 121; *Williams v. Ellis*, 5 Q. B. D. 175. [But in an appointment of a person by an insurance company to act as "agent or surveyor," the court refused to limit the word "agent" by the term "surveyor:" *Lycoming, etc., Ins. Co. v. Woodworth*, 83 Pa. St. 223.]

(c) 20 & 21 Vic. c. cxlvii. s. 53; *Kearns v. Cordwainers' Co.*, 6 C. B. N. S. 338, 28 L. J. 285.

(d) 2 & 3 W. 4, c. 71; *Shuttleworth v. Le Fleming*, 19 C. B. N. S. 687, 34 L. J. 309.

only easements included are those analogous to a right of way, that is, rights of utility and benefit, and not merely of recreation and amusement (*a*). The County Courts Act, in making a person subject to the jurisdiction of the Court of the district within which he "dwells or carries on his business," included under the latter expression only a personal carrying on of business, not cases where it was carried on altogether by an agent (*b*). The 24 Vict. c. 10, s. 6, which gives the Admiralty jurisdiction, when the ship-owner is not domiciled in England, over any claim of the owner of goods carried into any English port, for damage done to them by the negligence or misconduct of, or for "any breach of duty or of contract" by the ship-owner, master, or crew, seems confined to breaches of duty or contract having some analogy to what is provided in the earlier part of the section; and was therefore held not to apply to the wrongful refusal of a master to take a cargo to a port abroad (*c*).

§ 402. On the same principle, an Act which prohibits the "taking or destroying" the spawn of fish would not include a "taking" of spawn for the purpose of removing it to another bed; for the word "destroying," with which "taking" is associated, indicates that the taking which is prohibited is dishonest or mischievous (*d*). And in an Act which made it penal to "take or kill" fish without the leave of the owners of the fishery, the same kind of "taking" was similarly held to have been intended (*e*). An Act which prohibits the "having or keeping" gunpowder, does not apply to a person who "has" gunpowder for a merely temporary purpose, as a carrier, the kind of "having" intended by the Act being explained by the word "keeping," with which it is associated (*f*). So, where an Act punishes the "having or conveying" anything suspected of being stolen and not satisfactorily accounted for, the former expression is limited

(*a*) 2 & 3 W. 4, c. 71, *Mounsey v. Imray*, 3 H. & C. 486, 34 L. J. 52, 56. See *Webb v. Bird*, 10 C. B. 268; 13 C. B. 841.

(*b*) *Minor v. London & N. W. R. Co.*, 26 L. J. C. P. 39; *Shiels v. Rait*, 7 C. B. 116.

(*c*) *The Dannebrog*, L. R. 4 A. & E. 386.

(*d*) 3 Jac. 1, c. 12; *Bridger v. Richardson*, 2 M. & S. 568.

(*e*) 22 & 23 Car. 2, c. 25; *R. v. Mallinson*, 2 Burr. 679.

(*f*) 12 Geo. 3, c. 61; *Biggs v. Mitchell*, 2 B. & S. 523, 31 L. J. M. C. 631; *R. v. Strugnell*, L. R. 1 Q. B. 931.



by the latter, and does not, therefore, apply to the possession of a house (*a*). An Act which made it felony to "cast away or destroy" a ship was held not to apply to a case where the ship was run aground or stranded upon a rock, but was afterwards got off in a condition capable of being refitted (*b*). This rule was applied to the construction of the repealed Act, 1 Vict. c. 85, which made it felony "to shoot, cut, stab, or wound;" for the latter term was held to be restricted, by the verbs which preceded it, to injuries inflicted by an instrument; and consequently to bite off a finger or a nose, or to burn the face with vitriol, was not to wound within the meaning of the Act (*c*).

§ 403. One phrase or clause, in the same way, sometimes materially limits the effect of another with which it is similarly associated. Thus, an Act which disgaveled lands "to all intents and purposes," and then went on to make them "descendible as lands at common law," was held to disgaivel them only for the purposes of descent (*d*). [So, where an act relating to landlord and tenant proceedings, after giving justices of the peace certain powers, provided that no appeal should lie in the case of rent, but went on to add that the remedy by replevin shall remain as heretofore, it was clear that the denial of an appeal related to the tenant only.<sup>36</sup>] The section of the Annuity Act, 17 Geo. 3, c. 26, which

(*a*) 2 & 3 Vict. c. 71; Hadley v. Perks, L. R. 1 Q. B. 444.

(*b*) De Londo's Case, 2 East, P. C. 1098.

(*c*) R. v. Harris, 7 C. & P. 446; R. v. Stevens, 1 Moo. C. C. 409; R. v. Murrow, Id. 456; Jennings's Case, 2 Lew. 130. [See for other illustrations of this construction, ante, § 303.]

(*d*) Wiseman v. Cotton, 1 Lev. 80.

<sup>36</sup> Hilke v. Eisenbeis, 104 Pa. St. 514. Similarly, an act that required judgments, *recognizances*, *sci. fa.'s* and executions to be entered in a "book to be called the judgment index," in order to constitute a lien, was held clearly to refer to *recognizances* in the common pleas, not in the orphans' court: Holman's App., 106 Id.

502. An act giving a right of action against the grantor in a deed to an assignee of the grantee, for breach of a covenant against incumbrances, where the incumbrance "appears of record," was held to apply only where the incumbrance was of record in the registry of deeds, and a lien for unpaid taxes, appearing only in the records of a city or town, was held not within the statute: Carter v. Peck, 138 Mass. 439. And see Lane v. Harris, 16 Ga. 217, where an act providing "that no person shall be permitted to deny any bond, bill, . . . unless he, . . . shall make affidavit," etc., was held to apply only where the execution of the instrument is alleged to be the act of the party filing the answer, or adopted by him.

excepts from the general provisions of the enactment any "voluntary annuity granted without regard to pecuniary consideration," was construed as using the word "voluntary," not in its usual legal sense, as without consideration, but as without pecuniary consideration (*a*). [A notable instance of this operation of associated words occurred in the construction of the Pennsylvania act of 22 April, 1856, which declared that "no right of entry shall accrue, or actions be maintained for a specific performance of any contract for the sale of any real estate, or for damages for non-compliance with any such contract, *or to enforce any equity of redemption, after re-entry made for any condition broken*, or to enforce any implied or resulting trust as to realty, but within five years after such contract was made or such equity or trust accrued, with the right to entry, unless such contract shall give a longer time for its performance, or there has been, in part, a substantial performance, or such contract, equity of redemption, or trust, shall have been acknowledged, by writing, to subsist, by the party charged therewith, within the same period," etc. It was held that the construction of the phrase, "equity of redemption,"—a phrase familiarly, in legal parlance, applied to a mortgagor's right in the premises conveyed by him to the mortgagee as security for a debt,—must be construed in the light of the associated words "*after re-entry made for any condition broken*;" that, therefore, it could not mean a mortgagor's equity of redemption, but had reference to cases such as those arising upon the rights of a purchaser under a ground-rent deed, after re-entry by the grantor for non-payment of rent; and consequently, that the clause did not, in any way, affect the rights of mortgagors, nor make any alteration in the rule theretofore existing, which allowed a deed absolute on its face to be shown by parol to be a mortgage.<sup>36</sup>

§ 404. **Extending Effect of Association of Words.**—[On the other hand, the effect of associated words may also, sometimes, be an extending one. One section of a certain statute

(*a*) *Crespigny v. Wittenoom*, 4 E. & B. 374.  
 T. R. 790. See *Blake v. Attersoll*,  
 2 B. & C. 875; *Evatt v. Hunt*, 2 Ballentine v. White, 77 Id. 20.

imposed a specified tax upon tonnage upon every railroad, steamboat, canal and slackwater navigation company, and all other companies upon whose works freight might be transported, whether the compensation received by it be for transportation, transportation and tolls, or tolls only. The next section imposed, "in addition to" such tax, a tax upon gross receipts "upon every railroad, canal and transportation company." It was held that the phrase "transportation company" in the latter section took its meaning from the first section, with which it was thus associated, and meant all companies "upon whose works freight may be transported," etc., and thus included a corporation authorized to make slackwater navigation, but prohibited from engaging in transportation,—the phrase "transportation company" being treated as "*nomen generalissimum*," "*nomen collectivum*," taking its meaning from the more particular designation in the section to which it stood "in immediate juxtaposition."<sup>87</sup>]

§ 405. **Rule as to Generic Words Added to Specific.**—It is, however, the use of a general word following (a) one or more less general terms *eiusdem generis*, which affords the most frequent illustration of the rule under consideration. *Generi per speciem derogatur*. In the abstract, general words, like all others, receive their full and natural meaning. If a right of hunting, shooting, and fishing is granted, all things generally hunted, shot, and fished are included (b). The 3 & 4 Will. 4, c. 42, s. 3, which limits the time for suing "upon any bond or other specialty," comprehends under the last expression every kind of specialty, including a statute (c). [So, where an act enabled married women to be sued, jointly with their husbands, upon any note, bill of exchange, single bill, bond, contract or agreement executed by such married woman jointly with her husband, it was held that a statutory bond required of a collector of state taxes, executed by him as principal and by his wife, another married woman and her husband as sureties, was included.<sup>88</sup>] In such cases,

<sup>87</sup> *Monongahela Nav. Co. v. Com'th*, 66 Pa. St. 81, 83. N. S. 264, 34 L. J. 261.

(a) Not preceding; see *ex. gr.*

*King v. George*, 5 Ch. D. 627.

(b) *Jeffreys v. Evans*, 19 C. B.

(c) *Cork & Bandon R. Co. v. Goode*, 13 C. B. 836.

<sup>88</sup> *Smith v. State (Md.)* 5 Centr. Rep. 607.

the general principle applies, that the terms are to receive their plain and ordinary meaning; and Courts are not at liberty to impose on them limitations not called for by the sense, or the objects or mischief of the enactment (*a*). But the general word which follows particular and specific words of the same nature as itself takes its meaning from them, and is presumed to be restricted to the same genus as those words (*b*): or, in other words, as comprehending only things of the same kind as those designated by them; unless, of course, there be something to show that a wider sense was intended.

Thus, the Sunday Act, 29 Car. 2, c. 7, which enacts that "no tradesman, artificer, workman, laborer, or other person whatsoever, shall do or exercise any labor, business, or work of their ordinary callings upon the Lord's Day," has been held not to include a coach proprietor (*c*), or a farmer (*d*), or, no doubt, an attorney (*e*); the word "person" being confined to those of callings like those specified by the preceding words. For a similar reason, the 20 Geo. 2, c. 19, which empowers justices to determine differences between masters and "servants in husbandry, artificers, handicraftsmen," and persons in some other specific employments, and "all other laborers," does not include a domestic servant (*f*), or a man employed to take care of goods seized under a writ (*g*); for though in the abstract they may be "laborers," their employments have no analogy with those specified (*h*).

(*a*) *Per Cur.* in *U. S. v. Coombes*, 12 Peters, 80.

(*b*) See *per Willes, J.*, in *Fenwick v. Schmaltz*, L. R. 3 C. P. 315. [This rule is said to be especially forcible in the interpretation of acts falling under the rule of strict construction: *Re Swigert*, 119 Ill. 83. An act conferring on Justices of the Peace civil jurisdiction in cases of "torts, trespasses and other injuries," was held not to include libel and slander: *Engelking v. Von Wamel*, 26 Tex. 469. See *Ramsey v. Gould*, 57 Barb. (N. Y.) 398, *infra*, § 407. But see *post*, § 408, note.]

(*c*) *Sandiman v. Breach*, 7 B. & C. 96.

(*d*) *R. v. Cleworth*, 4 B. & S. 927; *R. v. Silvester*, 33 L. J. M. C. 79, *S. O.*

(*e*) *Peate v. Dicken*, 1 C. M. & R. 422.

(*f*) *Kitchen v. Shaw*, 6 A. & E. 729. *Comp. Exp. Hughes*, 23 L. J. M. C. 138; *Davies v. Berwick*, 3 E. & E. 549, 30 L. J. M. C. 84.

(*g*) *Bramwell v. Pennock*, 7 B. & C. 536.

(*h*) It would include, however, a man who contracted to work by the piece, not by the day, provided the relation of master and servant existed: *Lowther v. Radnor*, 8 East, 113; *Comp. Lancaster v. Greaves*, 4 B. & C. 628; *Exp. Johnson*, 7 Dowl. 702; *R. v. Heywood*, 1 M.

[So, where an act gave a lien for wages "due for labor and services rendered by any miner, mechanic, laborer or clerk, from any person . . . employing clerks, miners, mechanics or laborers, either as owners . . . of any works, mines, manufactory or other business where clerks, miners, or mechanics are employed," etc., it was held not to extend to wages of persons employed about an hotel."'] The Metropolitan Building Act of 1855, which entitles a district surveyor "or other person," to a month's notice of action for anything done under the Act, was held, on this principle, not to give that privilege to every person sued, but to give it only to persons ejusdem generis with a district surveyor; that is, having an official duty (*a*). An Act which made it felony to break and enter into a "dwelling, shop, warehouse, or counting-house," would not include a workshop, but only that kind of shop which had some analogy with a warehouse; that is, one for the sale of goods (*b*). In an Act imposing a penalty on unqualified persons navigating "any wherry, lighter, or other craft," the last word would include only vessels of the same kind as wherries and lighters, not steam tugs which carried neither passengers nor goods (*c*). But the same word would be more comprehensive if it had followed "boats and vessels" (*d*). A prohibition against deducting from an artificer's wages any part of them "for frame rent and standing, or other charges,"

& S. 624. See, also, *Gordon v. Jennings*, 9 Q. B. D. 45, 51 L. J. 417. [Comp. ante, § 99.]

<sup>29</sup> *Allen's App.*, 81\* Pa. St. (32 S.) 302; *Sullivan's App.*, 77 Id. 107.

(*a*) *Williams v. Golding*, L. R. 1 C. P. 69. *Comp. Newton v. Ellis*, 1 E. & B. 115.

(*b*) *R. v. Saunders*, 9 C. & P. 79. [In *People v. Richards*, (N. Y.) 11 Centr. Rep. 75, under the New York Penal Code (§§ 498 and 504) declaring guilty of burglary any person, who, with intent to commit a crime therein, breaks and enters a building, and enacts that the term "building" includes "a railway car, vessel, booth, tent, shop or other erection

or inclosure," it was held that the phrase "or other erection or enclosure" should be limited to the same class of objects as those designated by the preceding specific terms; and that consequently (the word "building" being limited to those structures, which, at the time of the enactment of the code, were included in the common law and statutory definitions of burglary), breaking into a vault, used exclusively for the interment of the dead, was not burglary under said sections.]

(*c*) *Read v. Ingham*, 3 E. & B. 889, 23 L. J. M. C. 156.

(*d*) *Tisdell v. Coombe*, 7 A. & E. 788.

would not include, under the last word, a fine incurred for breach of agreement (*a*).

§ 406. The 11 Geo. 2, c. 19, which authorizes the distress for rent of "corn, grass, or other product" growing on the demised lands, includes only products similar to grass and corn; but not young trees, which, though unquestionably products of the land, are of a different character from the products specified by the earlier terms (*b*). For the same reason, young trees are not included in the Act which punishes the stealing of "any plant, root, fruit, or vegetable production growing in a garden, orchard, nursery-ground, hot-house or conservatory" (*c*). [And for reasons entirely similar, in an act enabling the owner of realty to maintain an action of replevin to recover timber, lumber, coal, or other property severed from the realty, notwithstanding the title to the land may be in dispute, the phrase "other property" includes only things of the same kind as timber, lumber, or coal,—*e. g.*, slate, marble, zinc ore, iron ore, and all other forms of minerals, building stone and fixtures, and machinery of every description permanently fixed to the realty, but not growing crops.<sup>40</sup>] An Act which prohibited playing or betting in the streets "at or with any table or instrument of gaming," would not include, under the last general words, half-pence used for tossing for money (*d*). A by-law which imposed a penalty for causing an obstruction in the street in various specified ways, all of a temporary character, or otherwise causing or committing "any other obstruction, nuisance, or annoyance" in any of the streets, was held not to include, under the latter words, any obstruc-

(*a*) *Willis v. Thorp*, L. R. 10 Q. B. 388.

(*b*) *Clark v. Gaskarth*, 8 Taunt. 431.

(*c*) *R. v. Hodges*, 1 Moo. & M. 341. See *Radnorshire Bd. v. Evans*, 3 B. & S. 400, 32 L. J. M. C. 100; *Smith v. Barnham*, 1 Ex. D. 419.

<sup>40</sup> *Renick v. Boyd*, 99 Pa. St. 555. And see *People v. N. Y.*, etc., R. R. Co., 84 N. Y. 565, as to construction of the word "property," in the phrase "money,

funds, credits and property." Compare, also, *Thames, etc., Ins. Co. v. Hamilton*, L. R. 12 App. Cas. 484, as to a policy of insurance covering perils of the sea, specially naming many, and "all other perils, losses and misfortunes," etc.

(*d*) *Watson v. Martin*, 34 L. J. M. C. 50, rectified by 31 & 32 Vict. c. 52, s. 3; *Hirst v. Molesbury*, L. R. 6 Q. B. 130. But see *R. v. O'Connor*, 15 Cox, 3.

tion which was not of a temporary character (*a*). The enactment which prohibited the establishment, without license, of "the business of a blood boiler, bone boiler, fellmonger, slaughterer of cattle, horses, or animals of any description, soap boiler, tallow melter, tripe boiler, or other noxious or offensive "business, trade, or manufacture," was held not to include under the final general terms any employments not connected, as all the specified trades were, with animal matter; and so did not reach brick making (*b*). An Act which gives a vote to the occupier of a "house, warehouse, counting-house, shop, or other building," includes, in the latter term, only buildings which, like those specifically mentioned, are of some permanence and utility, and contribute to the beneficial occupation of the land, increasing thereby its value (*c*). The words "tenements and hereditaments," which, in their technical sense, embrace not only every species of right connected with land, such as rents, tithe, rights of common, seignorial rights, but also offices, have been confined to habitable structures, when coupled with and following such words as "houses, warehouses, and shops" (*d*). [In an act making it penal for any "warehouseman, wharfinger, or other person," to issue any vouchers for goods, wares, etc., unless he shall have actually received them in store, or to ship or transfer such goods, etc., without the return of the receipt, the phrase "other person" is to be construed ejusdem generis with warehouseman and wharfinger, and does not include one who received grain on storage with the option of becoming its purchaser, and without compensation if he should not exercise that option, and who gave a receipt not intended to be negotiable."] Where an Act authorized the police to enter any house or room used

(*a*) *R. v. Dickenson*, 7 E. & B. 831, 26 L. J. M. C. 204.

(*b*) 11 & 12 Vict. c. 63, s. 64; Pub. Health Act, 1875, s. 112; *Wanstead Board v. Hill*, 13 C. B. N. S. 479.

(*c*) *Powell v. Boraston*, 18 C. B. N. S. 175, 34 L. J. 73; and see *Morish v. Harris*, L. R. 1 C. P. 155. *Comp. Hodgson v. Jex*, 2

Ch. D. 122; *Chapman v. Chapman*, 4 Id. 800.

(*d*) *R. v. Manchester Waterworks Co.*, 1 B. & C. 630; *East London Waterworks Co. v. Mile End*, 17 Q. B. 512, 21 L. J. M. C. 49. See, also, *Chelsea Waterworks v. Bowley*, 17 Q. B. 358; *R. v. Nevill*, 8 Q. B. 452.

<sup>41</sup> *Bucher v. Com'th*, 103 Pa. St. 528.

for stage plays, and imposed a penalty for keeping any house or other "tenement" as an unlicensed theatre; it was held that the word "tenement" was confined in meaning to something of the same character as "house" or "room," and so did not include a portable booth, consisting of two wagons joined together, and used as a theatre by strolling players (*a*). The 3 & 4 Will. 4, c. 90, s. 33, which enacted that the owners of "houses, buildings, and property other than land," ratable to the poor, should be rated at thrice the rate imposed on the owners of land, was held confined to that kind of "property other than land," which was ejusdem generis with "houses and buildings," and that a railway, a canal, with its towing-paths, and a dry dock lined with masonry, which were its accessories, were not comprised in the expression, but were ratable as land (*b*). On the same principle, the Companies Act of 1862, which provides (sect. 79) that a company may be wound up by the Court of Chancery when the company passes a resolution in favor of that course, or does not begin business within a year, or its members are reduced to less than seven, or when the Court thinks a winding up "just and equitable," empowers the Court by these last general words to wind up only when it is just and equitable on grounds analogous to those precedingly stated (*c*).

§ 407. [An act empowering certain officers to correct "clerical or other errors" in assessments was, upon the same principle, construed as referring only to errors of form in the assessment roll, not to errors of the assessors in the making of the assessment, nor to any substantial errors of judgment or of law." 'So, an act prohibiting attorneys from buying any bond, bill, promissory note, bill of exchange, book debt, or other thing in action, with the purpose of

(*a*) *R. v. Midland R. Co.*, 10 Q. B. 389; *Fredericks v. Howie*, 1 H. & C. 881, 31 L. J. M. C. 249. *Comp. R. v. Midland R. Co.*, 4 E. & B. 958; *Day v. Simpson*, 18 C. B. N. S. 680, sup. § 189.

(*b*) *R. v. Neath*, L. R. 6 Q. B. 707.

(*c*) *Spackman's Case*, 1 McN. & G. 170; *Re Anglo-Greek Steam Co.*, L. R. 2 Eq. 1; *Re Langham Rink Co.*, 5 Ch. D. 669. See under The Apportionment Act of 1870, *Re Cox's Trusts*, 9 Ch. D. 159.

<sup>49</sup> *Re Hermance*, 71 N. Y. 481.



suing thereon, would not include stock in a corporation.<sup>43</sup> In a statute that provides that "any married woman whose husband, either from drunkenness, profligacy, or any other cause, shall neglect or refuse to provide for her support . . . shall have the right in her own name to transact business, and to receive and collect her own earnings," the words "any other cause" must be understood as referring to causes of a kind with those previously specified, and not to include mere physical and mental incapacity,<sup>44</sup> nor any temporary inability of the husband, in consequence of sickness, to support his wife.<sup>45</sup> So, a power given to certain board of officers, in the management of a public institution, to remove employees "for incompetency, improper conduct, or other cause satisfactory to the board," means other kindred cause.<sup>46</sup> Where the charter of a city empowered it to tax persons engaged in particular trades or occupations, enumerating them, such as auctioneers, grocers, merchants, retailers, hotels, hackney carriages, etc., "and all other business, trades, avocations, or professions whatever," it was held that there was no authority to tax any occupation of a class not specifically designated, *e. g.*, that of lawyers.<sup>47</sup> An act giving jurisdiction to the court of common pleas to appoint viewers to assess the damages, whenever a borough might "change the grade or lines of any street or alley, or in any way alter or enlarge the same," was held to be intended to give a remedy to an abutting owner where his property was injured by a change of grade only, and hence not to repeal the general statute giving a remedy by proceedings in the Quarter Sessions to obtain damages for opening or widening a street or alley.<sup>48</sup> A law authorizing the assessment of a tax on bowling alleys and billiard tables, and also on auctioneers and other venders of merchandize, etc., by outcry, and all other places of business or amusement conducted for profit,

<sup>43</sup> *Ramsey v. Gould*, 57 Barb. (N. Y.) 398.

<sup>44</sup> *Edson v. Hayden*, 20 Wis. 682.

<sup>45</sup> *King v. Thompson*, 87 Pa. St. 365.

<sup>46</sup> *State v. McGarry*, 21 Wis. 496.

<sup>47</sup> *St. Louis v. Laughlin*, 49 Mo.

559. But, in this case, the principle of strict construction aided this interpretation: *Ibid.*

<sup>48</sup> *Re Brady Street*, 99 Pa. St. 591. "Looking at the manifest object of the act, we must read these general words in connection with such object," says the Court. *Ibid.*, p. 595.

does not warrant the imposition of the tax upon merchants, bankers and the like." An act avoiding, unless acknowledged, every "bargain, sale, mortgage, or other conveyance of houses and lands" was held inapplicable to a lease for years of land and a right of way." So, where an act of the confederate congress authorized, whenever the exigencies of any army in the field required it, the impressment of "forage, articles of subsistence, or other property," it was held that it did not sanction the impressment of an hotel or drug-store for hospital purposes." Nor can "transport in any wagon, cart, sleigh, boat, or otherwise," extend to driving cattle on foot."<sup>49</sup>

§ 408. Of course, the restricted meaning which primarily attaches to the general word in such circumstances, is rejected," when there are adequate grounds to show that it was not used in the limited order of ideas to which its predecessors belong. Thus, where an inspector of nuisances was authorized to inspect articles of food deposited in "any place" for sale, and a penalty was imposed on persons who prevented him from entering any "slaughter-house, shop, building, market, or other place," where any carcass was deposited for sale; it was held that the latter word was not confined to places ejusdem generis with those which preceded it. The earlier passage, giving authority to enter "any place," obviously required that the same word should receive an equally extensive meaning in the subsequent passage (a). The 103rd section of the Public Health Act of 1848, which imposes a penalty for making any "sewer, drain, privy, cesspool, ashpit, building, or other work, contrary to

<sup>49</sup> Butler's App., 73 Pa. St. 448.

<sup>50</sup> Stone v. Stone, 1 R. I. 425. See, as to inclusion of leases in conveyances, etc., ante, § 145.

<sup>51</sup> White v. Ivey, 34 Ga. 186.

<sup>52</sup> U. S. v. Sheldon, 2 Wheat. 119. Compare also, further, upon this principle, State v. Stoller, 38 Iowa, 321; McIntyre v. Ingraham, 35 Miss. 25; State v. Pemberton, 30 Mo. 376; Bish., Wr. L., § 245.

<sup>53</sup> Even in the construction of penal statutes: see Foster v. Blount, 18 Ala. 687; Woodworth

v. State, 26 Ohio St. 196. It is, indeed, said, in State v. Holman, 3 McCord (S. C.) 306, that the rule in question, does not apply in the interpretation of a criminal statute, except where there is some repugnancy or incompatibility between the specific and general expressions. See this case, post, § 410, and see other cases infra.

(a) Young v. Gratriddle, L. R. 4 Q. B. 166. See, also, Harris v. Jenns, 9 C. B. N. S. 152, 30 L. J. M. C. 183.

the provisions of the Act," would include, under the word "building," not only constructions of a character similar to those previously mentioned, but also dwelling houses (*a*).

When justices, empowered to prepare a standard for an equal county rate, were authorized for this purpose to direct overseers, assessors of rates, and other persons having the management of the rates or valuations, to make returns of the annual value of the property in the parish, and to require "the said overseers, assessors, collectors, and any other persons whomsoever," to produce parochial and other rates and valuations, "and other documents in their custody or power," the context showed that the final generic expression was not confined to official, but extended to private persons (*b*). So, where an Act imposed a rate on a variety of tenements and buildings which were enumerated, and on "other buildings and hereditaments, meadow and pasture excepted," the exception appended to the concluding general words showed that the latter were used in their widest sense, and were not limited in meaning by the particular terms which preceded them (*c*).

§ 409. Further, the general principle in question applies only where the specific words are all of the same nature. Where they are of different genera, the meaning of the general word remains unaffected by its connection with them. Thus, where an Act made it penal to convey to a prisoner, in order to facilitate his escape, "any mask, dress, or disguise, or any letter, or any other article or thing," it was held that the last general terms were to be understood in their primary and wide meaning, and as including any article or thing whatsoever which could in any manner facilitate the escape of a prisoner, such as a crowbar (*d*). Here, the several particular words "disguise" and "letter," exhausted whole genera; and the last general words must be understood, therefore, as referred to other genera.

(*a*) *Pearson v. Kingston*, 3 H. & C. 921, 35 L. J. M. C. 44. See *Morish v. Harris*, L. R. 1 C. P. 155, 35 L. J. 101.

(*b*) *R. v. Doubleday*, 3 E. & E. 501, 30 L. J. 99.

(*c*) *R. v. Shrewsbury*, 3 B. & Ad. 216.

(*d*) *R. v. Payne*, L. R. 1 C. C. 27. See also *Shillito v. Thompson*, 1 Q. B. D. 12.

§ 410. The general object of the Act, also, sometimes requires that the final generic word shall not be restricted in meaning by its predecessors. [The rule in general requiring the opposite is merely an aid in ascertaining the legislative intent, and, of course, does not warrant the court in confining the operation of a statute, be it penal or otherwise, within limits narrower than those intended by the law-maker, "nor require the entire rejection of general terms; but is to be taken and applied in connection with other principles of statutory construction, *e. g.*, that the declared intention of the Legislature is to be carried into effect."'] Thus the 17 Geo. 3, c. 56, which, after reciting that stolen materials used in certain manufactures were often concealed in the possession of persons who had received them with guilty knowledge, and that the discovery and conviction of the offenders was in consequence difficult, proceeded to authorize justices to issue search warrants for purloined materials suspected to be concealed "in any dwelling-house, out-house, yard, garden, or other place," was held to include, under the last word, a warehouse which was a mile and a half from the dwelling-house; though all the places specifically enumerated were such only as are immediately adjacent to a dwelling house (*a*). Though such a warehouse would probably not be usually considered as *ejusdem generis* with a "dwelling-house," coupled with its enumerated dependencies, it was reasonable, having regard to the preamble and the general object of the statute, to think that the warehouse was within the contemplation of the Legislature, as it was a very likely place for the concealment against which the enactment was directed; and a narrower construction would have restricted the effect, instead of promoting the object of the Act. The requirement of the Municipal Corporations Act, 5 & 6 Will. 4, c. 76, s. 32, that voting papers should be signed by the voter, and state the name of the "street, lane, or place," in which the property was situated in respect of which he claimed to vote, was considered satisfied by a statement of the parish where the property lay; the object of the provision

<sup>54</sup> Woodworth v. State, 26 Ohio (S. C.) 474.  
St. 196.

(*a*) R. v. Edmundson, 2 E. & E.  
<sup>55</sup> State v. Williams, 2 Strob. 77, 28 L. J. M. C. 213.

being, apparently, the identification of the voter (*a*). [So, where an act prohibited the sale of liquors, cigars, tobacco, candies, peaches, mineral water "and other articles" within a specified distance from a religious meeting, without permission, etc., it was, with reference to the object of the law to prevent the sale of all articles except by permission, held that the statute was violated by the sale not only of the articles enumerated, but of any other, the circumstances otherwise bringing the case within the act.<sup>56</sup> An act punishing one willfully putting into a ball of cotton any "stone, wood," etc., or "any matter or thing whatsoever," would embrace one who put in an undue quantity of water.<sup>57</sup> An act punishing the taking of "cotton, corn, rice, or other grain," was, by the last phrase, held to include peas.<sup>58</sup> And a supervisor of roads was held to be within the protection of a statute punishing resistance to a "sheriff, constable, or other officer."<sup>59</sup>]

§ 411. Several decisions on a recent enactment are instructive examples of the application of the above-mentioned rules, as to the effect of words of analogous meaning on each other, and of specific words on the more general one, which closes the enumeration of them; as well as of their subordination to the more general principle of gathering the intention from a review of the whole enactment, and giving effect to its paramount object. The 16 & 17 Vict. c. 119, after reciting that a kind of gaming had lately sprung up, to the demoralization of improvident persons, by opening places called betting-houses or offices, enacts, for the better suppression of them, that any person who, being "the owner or occupier of any house, office, room, or place," should "open, keep, or use," or "knowingly per-

(*a*) *Per* Lord Campbell and Crompton, J., in *R. v. Spratley*, 6 E. & B. 263, 25 L. J. 257. See *Lowther v. Bentinck*, L. R. 19 Eq. 166.

<sup>56</sup> *State v. Solomon*, 33 Ind. 450.

<sup>57</sup> *State v. Holman*, 3 McCord (S. C.) 306.

<sup>58</sup> *State v. Williams*, *supra*. And see *Randolph v. State*, 9 Tex. 521, as to "any other banking game."

<sup>59</sup> *Woodworth v. State*, 26 Ohio St. 196. See, also, *Bish.. Wr. L.*,

§ 246. In construing a contract between a reservoir company and the owner of a cotton mill, whereby the latter was to have the right to draw water to run his mill, "or such other mill or mills as may be erected upon his said privilege," the court refused to restrict the latter phrase to mills of the same kind, but held it to include a paper mill: *Phoenix, etc., Co. v. Hazen*, 118 Mass. 350.

mit" it to be used for the purposes of betting, should be liable to a penalty of 50*l.*, and to an action for the recovery of any deposit made with him in respect of the bet. The Court of Common Pleas held that a man who habitually resorted to a certain spot under a tree in Hyde Park, and there made bets, occupied a "place" within the meaning of the Act. Although that general word was used with specific ones which involved the idea of structure, the mischief aimed at, which was to prevent skilled persons using a well-known place for inducing improvident persons to bet, was equally great whether under a tree or in a room (*a*). This decision was reversed by the Exchequer Chamber on the ground, chiefly, that the defendant could not be said to be the "occupier" of the place; as that expression derived a meaning from the one with which it was coupled, which implied some legal and exclusive title to the place (*b*). But a temporary wooden structure, erected on a piece of ground rented by the person who used it for betting purposes, though unroofed and not fixed to the soil, was afterwards held to be a "place" within the Act (*c*); and in another case, a man who carried on the same business, standing on a stool sheltered under a large umbrella on which was printed an indication of the business, was held to be the "occupier of a place" within the Act; as he had in fact appropriated it for his proceedings, though he paid no rent and had no greater right to stand on the spot than any others of the public who were admitted (*d*). In another case a piece of enclosed land of about four acres was considered a "place" within the Act (*e*). [On the other hand, in a statute empowering municipal officers to "sell" shares of a railway corporation for which the city had subscribed, the addition of the general phrase: "and to do whatever else may seem necessary . . . in the premises," was held not to work an enlargement of the powers specifically granted, but to invest the officers with a discretion only as to the manner of sale, and not to authorize them to barter or

(*a*) *Doggett v. Cattarns*, 17 C. B. N. S. 669, 84 L. J. 46.

(*b*) *Id.*, 19 C. B. N. S. 765, 34 L. J. 159.

(*c*) *Shaw v. Morley*, L. R. 3 Ex.

(*d*) *Bows v. Fenwick*, L. R. 9 C. P. 339. See a similar case.

*Galloway v. Maries*, 8 Q. B. D. 275, 51 L. J. M. C. 53.

(*e*) *Eastwood v. Mellor*, L. R. 9 Q. B. 440.

exchange the shares,<sup>60</sup>—an effect, attributed in the decision to the phrase “in the premises,” clearly limiting the discretion to the manner of the execution of the special grants of power.]

§ 412. **Rule that Inferior Does not Include Superior.**—Analogous to the rules above considered is another, that when words descriptive of the rank of persons or things are used in a descending order according to rank, the general words super-added to them do not include persons or things of a higher rank or importance than the highest named, if there be any lower species to which they can apply.<sup>61</sup> In such a case, the general word is taken not as generic, but as including only what is lower in the genus than the lowest specified. Thus, the 13 Eliz. c. 10, s. 3, which avoided conveyances by masters and fellows of colleges, deans and chapters of cathedrals, parsons, vicars, and “others having any spiritual or ecclesiastical living,” would not include bishops (*a*). The statute of Marlbridge, 52 Hen. 3, c. 29, also, which gave a right of action in certain cases to “abbots, priors, and other prelates of the Church,” did not, according to Lord Coke, include bishops; because, among other reasons, the bishop is of a higher degree than an abbot (*b*.) Duties imposed, under the general head of “metals,” upon “copper, brass, pewter, and tin, and on all other metals not enumerated,” would include only metals inferior to those named, and not fall on gold or silver, which are commonly known as precious metals (*c*). [After enumerating several descriptions of claims that shall be entitled to preference in the distribution of an intestate’s estate, where the same is insufficient to pay

<sup>60</sup> *Cleveland v. State Bank*, 16 Ohio St. 236.

<sup>61</sup> This rule, as well as that requiring the construction of general expressions following specific ones as intended to designate things ejusdem generis, is said to “accord with the ordinary workings of the human mind. A writer who enumerates certain things, adding a general clause, mentions, as of course, the highest things, and some of each class, within those which he had in contemplation. . . We reasonably as-

sume, therefore, in construing his language, that he did not intend to include things higher than any mentioned, or of a class outside of those specified.” Bish., Wr. L., § 246b.

(*a*) *The Abp. of Canterbury’s Case*, 2 Rep. 46b.; *Copland v. Powell*, 1 Bing. 373. [*Woodworth v. Paine’s Adm’rs*, 1 Ill. 294. And see *Ellis v. Murray*, 28 Miss. 129.]

(*b*) 2 Inst. 151, 457, 478; 2 Rep. 46b.

(*c*) *Casher v. Holmes*, 2 B. & Ad. 592; *per Parke, B.*

all the debts, an act directs that the "executors . . . shall then pay the balance on the legal demands in equal proportions, according to their amount, without regard to the nature of said demand, not giving preference to any debts on account of the instrument of writing on which the same may be founded." Among the enumerated claims, judgments were not mentioned. It was held, that, as, at common law, debts were to be paid by executors according to their dignity, and as an enumeration of things or persons of an inferior could not embrace things or persons of a superior dignity, judgments retained the preference in the distribution which they had before.<sup>69</sup> The 22 & 23 Car. 2, c. 25, which empowered the lords of "manors and other royalties" to grant a deputation to a gamekeeper, was limited to the lords of such royalties as are inferior to manors; for if a royalty of a higher nature had been meant, that would have preceded the term "manor" (a).

The 2 Westm. c. 47, which prohibited salmon-fishing from Lady-day to St. Martin's, in "the waters of the Humber, Owse, Trent, Done, Arre, Derewent, Wherfe, Nid, Yore, Swale, Tese, Tine, Eden, and all other waters wherein salmons be taken," was considered as including, in the final general expression, only rivers inferior to those enumerated, and therefore as not comprising nobile illud flumen, the Thames (b). An Act which punished cruelty to any "horse, mare, gelding, mule, ass, ox, cow, heifer, sheep, or other cattle," was held not to include a bull (c). A statute which spoke of indictments before justices of the peace and "others having power to take indictments," was understood, on the general ground under consideration, as not applying to the Superior Courts (d). But the 11 & 12 Vict. c. 42, which authorizes justices of the peace to inquire into indictable offences committed on the high seas or abroad, and to bind the witnesses to appear at the next "court of oyer and terminer, or jail delivery, or superior court of a County Palatine, or the Quarter Sessions," would authorize a justice

<sup>69</sup> Woodworth v. Paine's Adm'rs, 4 T. R. 224, 459.  
1 Ill. 374.

(a) Ailesbury v. Pattison, Doug.  
28. See, also, Evans v. Stevens, (b) 2 Inst. 478.  
(c) Exp. Hill, 3 C. & P. 225.  
(d) 2 Rep. 46b.



to hold an inquiry into an offence committed by a Colonial Governor in his colony, which is triable by the Queen's Bench. That court, was included in the words, "court of oyer and terminer" (a).

§ 413. [Notwithstanding the reasonableness of this mode of construction, founded as it is upon the experience of the natural working of men's minds,<sup>63</sup> "when the court can discern that the mind of the maker of a statute moved otherwise, it should not apply to his work this rule of interpretation."<sup>64</sup> Thus, where the express words used in the detailed enumeration embrace all the things or persons capable of being classed as of an inferior degree, and there are still general words used in addition, it is clear that they must be applied to things or persons of a higher degree than those enumerated.<sup>65</sup> Otherwise they would have to be left without effect, which is not permissible.<sup>66</sup>

§ 414. **Several Words Followed by a General Expression.**—[The strict rule of grammar would seem to require, as a general thing, a limiting clause, or phrase, following several expressions to which it might be applicable, to be restrained to the last antecedent." Thus, in a clause "reserving to the town of Hull the privilege of the shores and of feeding all lands not comprehended within the aforesaid bounds," the phrase "not comprehended," etc., was held to refer only to the last antecedent.<sup>67</sup> Under a provision providing for the adoption of a statute by cities and towns "at a legal meeting of the city council or the inhabitants of the town *called for that purpose*," it was held that the limitation contained in the phrase, "called for that purpose" did not apply to the

(a) R. v. Eyre, L. R. 3 Q. B. 487.

<sup>63</sup> See ante, § 412.

<sup>64</sup> Bish., Wr. L., § 246b.

<sup>65</sup> [Ellis v. Murray, 28 Miss. 129] 2 Inst. 137.

<sup>66</sup> [See ante, §§ 23, 265.] It was, indeed, once thought that in the 14 Geo. 2, c. 6, which made it a capital felony to steal sheep or "other cattle," this last expression was "much too loose" to include any other cattle than those already specified, viz., sheep; but this

extreme strictness of construction may perhaps be attributed to the excessive severity of the law in question: 1 Bl. Comm. 88. Comp. Child v. Hearn, L. R. 9 Ex. 176; Fletcher v. Sondes, 3 Bing. 580; R. v. Paty, 2 W. Bl. 721; Wright v. Pearson, L. R. 4 Q. B. 582.

<sup>67</sup> See Cushing v. Warwick, 9 Gray (Mass.) 382; Gyger's Estate, 65 Pa. St. 311. And see Fisher v. Connard, 100 Id. 63.

<sup>68</sup> Cushing v. Warwick, supra.

action of city councils."<sup>69</sup> Again, where the by-laws of a society provided that the annual meeting for the election of officers should be held on the first Sunday in July in each year, and the monthly meeting on the first Tuesday of each month, *at half past seven o'clock, P.M.*, it was held that "at half past seven o'clock, P.M.," must be deemed as fixing the hour for the monthly meeting only.<sup>70</sup> Similarly the words "which" and "said" are said to refer to the last antecedent, whether it be a word or a clause, to which they can properly apply, and not to include the clause preceding the last.<sup>71</sup> But this technical grammatical rule is liable to be displaced wherever the subject-matter requires a different construction,<sup>72</sup> in obedience to the principle elsewhere discussed,<sup>73</sup> that rules of that character are subordinated to a common sense reading of an enactment. An example in point here has already been given in that connection.<sup>74</sup> Another is found in the decision upon the construction of a clause preserving from discharge, under a judicial sale, the lien of a mortgage prior to all other liens "except other mortgages, ground-rents, purchase-money due the commonwealth, taxes, charges, assessments and municipal claims, *whose* lien, though afterwards accruing, has, by law, priority given it," where the relative "whose" was held to refer not only to the immediately antecedent term "municipal claims," but to taxes, charges and assessments as well, on the ground, that, as in other acts in *pari materia*, all these terms were used and grouped together as a class and intended to be so understood.<sup>75</sup> Indeed, in most cases, it will be found, on some ground of this sort, that, where several words are followed by a general qualifying expression which is as much applicable to the first as to the last, that expression is not limited to the last, but applies to all.<sup>76</sup> Thus, in a provision

<sup>69</sup> *Quinn v. Electr. Light Co.*, 140 Mass. 106, city councils, it is said, being usually composed of different bodies acting at regular meetings and under prescribed rules of procedure.

<sup>70</sup> *State v. Conklin*, 34 Wis. 21.

<sup>71</sup> *Fowler v. Tuttle*, 24 N. H. 9. And for a similar rule in the construction of provisoes, see ante, §

186.

<sup>72</sup> *Cushing v. Warwick*, supra.

<sup>73</sup> Ante, §§ 81, 82.

<sup>74</sup> *Gyger's Est.*, 65 Pa. St. 311, ante, § 81.

<sup>75</sup> *Fisher v. Connard*, 100 Pa. St. 63.

<sup>76</sup> *Great West. Ry. Co. v. Swindon, etc., Ry. Co.*, L. R. 9 App Cas. 787.

in the third section of the Land Clauses Act, that "lands" shall extend to "messuages, lands, tenements, and hereditaments *of any tenure*," the last words were held to apply to all the preceding ones, not to "hereditaments" only." So, an act providing that it should be lawful for any court having equity jurisdiction in any suit "concerning goods, chattels, lands, tenements or hereditaments, or for the perpetuating of testimony concerning any lands, tenements, etc., situate or being within the jurisdiction of such court," to order and direct the service of subpœnas upon defendants beyond its jurisdiction, it was held that the "goods, chattels, lands, tenements or hereditaments" mentioned in the first clause, were, like those in the clause concerning the perpetuating of testimony, such only as were "situate and being within the jurisdiction of such court."<sup>77</sup> Similarly, where words occur at the end of a section, it is said that they are presumed to refer to and to qualify the whole.<sup>78</sup> Thus, where a section provided that no person holding office under the act of which it was a part should be liable to military or jury duty, or to arrest on civil process, nor to service of subpœnas from civil courts *while actually on duty*, it was held that the latter phrase applied to the whole sentence.<sup>80</sup> And so where a restrictive provision occurs at the end of a series of sections. Thus, an act limited the compensation which certain officers might retain from fees received by them; a subsequent act provided, in one section, that, in a certain class of cases the officers might charge and receive from suitors certain fees, and, in the next section, that, in the remaining class of those cases, they should receive a like compensation from the United States; the last section provided that no officer should receive a greater compensation than the amount then limited by law; and it was held that this provision was applicable to the fees given by both sections.<sup>81</sup>

<sup>77</sup> Ibid.; Lord Bramwell saying, at p. 808, that in the phrase "horses, oxen, pigs and sheep, from whatever country they may come," the last clause would apply alike to horses, oxen, pigs and sheep.

<sup>78</sup> Eby's App., 70 Pa. St. 311,

314.

<sup>79</sup> Coxton v. Dolan, 2 Daly (N. Y.) 66. And see Hart v. Kennedy, 15 Abb. Pr. (N. Y.) 432.

<sup>80</sup> Ibid. See *infra*, § 415.

<sup>81</sup> U. S. v. Babbit, 1 Black, 55. It was said by the court, at p. 61, that, if the proviso could properly

But, where one section of an act gave to municipalities power to establish libraries, and the next section provided that "any town or city may appropriate money for suitable buildings or rooms, and for the foundation of such library a sum not exceeding one dollar for each of its ratable polls in the year next preceding," also annually thereafter a sum not exceeding fifty cents for each of its ratable polls, etc., it was held that clearly the restriction was only upon the amount to be put into books, not upon that to be expended upon the building or rooms.<sup>82</sup>

§ 415. **General Expression in Middle of Clause.**—[On the contrary, where general words occur in the middle of a sentence and sensibly apply to a particular provision of it, they are not to be extended to what follows.<sup>83</sup> Thus, in the case of the act above referred to,<sup>84</sup> it was said, that, had the last clause of the provision read "nor, *while actually on duty*, to service of subpoenas from civil courts," the sense would have been very different, the qualifying power of those words, in such case, being confined to the clause with which they would thus have been immediately connected.<sup>85</sup>

§ 416. **Reddenda Singula Singulis.**—[Where the opening words of a section are general, whilst the succeeding parts of it branch out into particular instances,—“where several words importing power, authority and obligation are found at the commencement of a clause containing several branches, it is not necessary that each of those words should be applied to each of the different branches of the clause; it may be construed *reddendo singula singulis*; the words giving power and authority may be applicable to some branches, and those

be applied only to the officers named in the section to which it was appended, the court would, upon the ground of identity of reason and intention, and the improbability of a contrary design, hold that it was clearly implied that the same rule should apply to those named in the previous section; declaring that “a thing within the intention of the makers of a statute is as much within the

statute as if it were within the letter.”

<sup>82</sup> Dearborn v. Brookline, 97 Mass. 466.

<sup>83</sup> Coxton v. Dolan, 2 Daly (N. Y.) 66. And see Hart v. Kennedy, 14 Abb. Pr. (N. Y.) 432. But see ante, § 318, for an instance of transposition of a proviso.

<sup>84</sup> Coxton v. Dolan, supra, § 414.

<sup>85</sup> Ibid.

of obligation to others.”<sup>86</sup> Thus, one section of an act provided “it shall and may be lawful for the directors, and they are hereby authorized and required, to form a new common sewer, and also to alter and reconstruct, all or any of the sewers of the city, and also to make such other alterations and amendments in the sewers as may or shall be necessary.” It was decided that the directors of the company were bound to form a new common sewer, but were merely authorized, and not bound, to alter and reconstruct the other sewers of the city.<sup>87</sup> Stated more generally, the rule is that words in different parts of a statute must be referred to their appropriate connections, giving each, in its proper place, its proper force, *reddendo singula singulis*, and, if possible, rendering none of them useless or superfluous;<sup>88</sup> or, again: “The different portions of a sentence, or different sentences, are to be referred respectively to the other portions or sentences to which we can see they respectively relate, even if strict grammatical construction should demand otherwise.”<sup>89</sup> The 3 & 4 William 4, c. 22, provided that “the property of, and in all lands, tenements, hereditaments, buildings, erections, works and other things which shall have been or shall hereafter be purchased, obtained, erected constructed or made by or by order of, or which shall be within or under the view, cognizance, or management of any Commissioners of Sewers,” should be vested in such commissioners. If this section had been read literally, the property

<sup>86</sup> Bayley, J., in *R. v. Bristol Dock Co.*, 6 B. & C., at pp. 191, 192. This quotation and the English cases in this section are borrowed from Wilb., Stat. L., pp. 189-191.

<sup>87</sup> *R. v. Bristol Dock Co.*, 6 B. & C. 181.

<sup>88</sup> *McIntyre v. Ingraham*, 35 Miss. 25.

<sup>89</sup> *Com'th v. Barber* (Mass.) 3 New Engl. Rep. 901, 903. Compare, however, *Com'th v. Haas*, 57 Pa. St. 443, 445, where, in construing a provision that “all indictments and prosecutions . . . shall be brought or exhibited within two years,” etc., the court refused to give to these words a distribu-

tive application, but held that “prosecution” and “indictment” were used as synonymous, and that the time limited was to be computed from the time a true bill was found. But this construction of the words “prosecution” and “indictment” was aided by other language in the act, indicating their use in the same sense, and the refusal to apply the principle *reddenda singula singulis* is, to some extent, placed upon the character of the enactment. “Astuteness must not be employed to narrow or take away a defence granted by law to a party accused of crime.”

in all lands which were under the view or cognizance of any Commissioners of Sewers would have vested in them, and the owners would have been deprived of their lands without compensation. To avoid this result, the court read the words *reddendo singula singulis*, and held that the section vested in the Commissioners the property in lands purchased by them, and in works and other things under their view, cognizance and management.<sup>90</sup> An act of Congress directed that all fines, penalties, and forfeitures accruing under the laws of Maryland and Virginia, in the District of Columbia should be recovered by indictment or information in the name of the United States, or by action of debt in the name of the United States and of the informer. It was held, *reddendo singula singulis*, that the proceedings should be by indictment, where, under the laws of the state in which it was taken such was the proper course, and by action of debt, where, by such laws, a private action only could be sustained.<sup>91</sup> The principle was also applied in the construction of an act, one section of which required all brokers and private bankers to make an annual return of the profits of their business, and another, to make a report of their names, places of business and capital employed, and then enacted that every "banker or broker who shall neglect or refuse to make the return and report required by the first and second sections of this act, shall for every such neglect or refusal, be subject to a penalty," etc. It was held that a separate penalty was imposed for the neglect to make each report or return, invoking the principle "*reddendum singula singulis*."<sup>92</sup>]

<sup>90</sup> *Stracey v. Nelson*, 12 M. & W. 535; 13 L. J. Ex. 97.

<sup>91</sup> *U. S. v. Gadsby*, 1 Cranch, C. Ct. 55; *U. S. v. Simms*, 1 Cranch, 252.

<sup>92</sup> *Com'th v. Cooke*, 50 Pa. St.

208. But it would seem that the principle was rather that stated in § 414, that general provisions at the end apply to each of several preceding particular ones. And see ante, § 256.

## CHAPTER XV.

## IMPLICATIONS AND INTENDMENTS. DIRECTORY AND IMPERATIVE PROVISIONS. IMPOSSIBILITIES. WAIVER.

- § 417. Incidents and Consequences Impliedly Sanctioned by Act.
- § 418. Implied Grant of Powers. Corporations, etc.
- § 419. Powers implied in Grant of Jurisdiction.
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- § 430. New Jurisdiction how to be Exercised.
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Imperative.
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| Duties Directory.
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- § 440. Remedy for Omission of Directory Duty.
- § 441. Impossibilities in the Nature of Things.
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- § 444. Waiver of Statutory Provisions as to Rights and Contracts.
- § 445. Waiver, etc., as to Procedure and Practice in Courts.
- § 446. No Waiver as against Public Policy and Rights of Others.
- § 447. No Waiver of Want of Jurisdiction.
- § 448. Estoppel from Claiming Benefit of Statute.

§ 417. Incidents and Consequences Impliedly Sanctioned by Act.  
—Passing from the interpretation of the language of Statutes,  
it remains to consider what intentions are to be attributed to

the Legislature, where it has expressed none, on questions necessarily arising out of its enactments.

Although, as already stated, the Legislature is presumed to intend no alteration in the law beyond the immediate and specific purposes of the Act, [and within the limits imposed by the operation of that principle,] these purposes are considered as including all the incidents or consequences strictly resulting from the enactment. Thus, an Act which declared an offence felony would impliedly give it all the incidents of felony; and it would make it an offence to be an accessory before or after it (*a*). [Where a statutory action as to one subject-matter is extended by a subsequent statute to a new case, everything annexed and incident to the action by the first statute is equally extended.] Where trustees were appointed by Statute to perform duties which would, of necessity, continue without limit of time, it was held that from the nature of the powers given to them, they were impliedly made a corporation (*b*). When a local authority had statutory powers to "recover" expenses, it was thereby also impliedly empowered not only to sue for them, but to sue in its collective designation, although not incorporated (*c*). The Act which gave the Admiralty Court jurisdiction over all claims for necessaries supplied to foreign ships, impliedly created a maritime lien on the ship, which follows it in the hands of a purchaser (*d*). The Bankruptcy Acts, in requiring a bankrupt to answer self-criminating questions relative to his trade and affairs, made his answers subject to the general

(*a*) 1 Hale, 632, 704; 1 Hawk. c. 38, s. 18; Coalheavers' Case, 1 Leach, 66; Gray v. R., 11 Cl. & F. 427.

<sup>1</sup> Baltimore, etc., R. R. Co. v. Wilson, 2 W. Va. 528. And where an act exempts from taxation the property of a certain corporation which it authorizes the same to acquire, property acquired by the corporation under authority given by a subsequent act is equally exempt: State v. Soc'y for Est. Usef. Manuf's (N. J.) 4 Centr. Rep. 139. A reservation of power to alter a charter gives the Legislature the right to impose additional taxation: State B'd of

Assessors v. R. R. Co. (N. J.) Id. 426.

(*b*) Exp. Newport Trustees, 16 Sim. 346; comp. Williams v. Lords of Admiralty, 12 C. B. 420; 2 L. M. & P. 456; Rivers v. Adams, 3 Ex. D. 861. [See, similarly, Barnet v. School Dir's, 6 Watts & S. (Pa.) 46; Kingley v. Sch. Dir's, 2 Pa. St. 28. And see Overseers v. Kline, 9 Id. 217, 219.]

(*c*) Mills v. Scott, L. R. 8 Q. B. 493.

(*d*) 3 & 4 Vict. c. 65, s. 6; The Ella Clark, Br. & L. 32, 32 L. J. P. M. & A. 211; The Two Ellens, L. R. 4 P. C. 161.



rules of the law of evidence, and consequently admissible in evidence against him, even in criminal proceedings. To hold otherwise would have been, in effect, to suppose that the Legislature, in expressly changing the law which had hitherto protected him from answering, intended also to make the further change, by mere implication, of suspending, pro tanto, the ordinary rule as regards the admissibility of self-prejudicing statements (*a*). [So, in Pennsylvania, an affidavit of defence filed by defendant under the statutes requiring such an affidavit, in order to prevent summary judgment in favor of plaintiff, as by default, may, upon analogy with the practice as to answers in chancery, be read in evidence, by the plaintiff, upon the trial.\*] The Judgments Extension Act of 1868, which provided for the execution, in Scotland and Ireland, of judgments recovered in England, was considered as having impliedly abolished the rule of procedure which required that a plaintiff residing out of the jurisdiction should give security for costs; the logical reason for the rule (which was, that if the verdict were against the plaintiff, he would not be within the reach of the process of the Court for costs), having been swept away by the enactment (*b*). [So, where an act, passed in 1874, establishing a new road law for a certain county, expressly repealed an act, passed in 1870, as to keeping in repair the public roads of that county it was held that another act, approved contemporaneously with that of 1870, as to the turning over of road money to the county commissioners, must fall with the repeal of that act.<sup>3</sup> And as to all implications, it is to be borne in mind that whatever is implied in a statute, whether in the way of a grant, of a restriction, or of a condition, is as much a part of the enactment as what is expressed therein.\*]

(*a*) *R. v. Scott*, D. & B. 47, 25 L. J. 128.

<sup>2</sup> *Bowen v. DeLattre*, 6 Whart. (Pa.) 430. But see *Maynard v. Bank*, 98 Pa. St. 250, that it is not to be considered as constituting a part of the evidence, unless so offered.

(*b*) *Raeburn v. Andrews*, L. R. 9 Q. B. 118. [See ante, § 209.]

<sup>3</sup> *Prince George's Co. v. Laurel*, 51 Md. 457.

<sup>4</sup> *Hanchett v. Weber*, 17 Ill. App. 114. Where an act provided, that, when any suit should fail, by reversal on writ of error, motion in arrest of judgment, plea in abatement, or on demurrer, "and the merits of the cause shall not be tried," plaintiff might begin an-

§ 418. **Implied Grant of Powers. Corporations, etc.**—In the same way, when powers, privileges, or property are granted by statute, everything indispensable to their exercise or enjoyment is impliedly granted also, as it would be in a grant between private persons. Thus, as by a private grant or reservation of trees, the power of entering on the land where they stand, and of cutting them down and carrying them away, is impliedly given or reserved; and by the grant of mines, the power to dig them (*a*); so under a Parliamentary authority to build a bridge on a stranger's land, the grantee tacitly acquires the right of erecting, on the land, the temporary scaffolding which is essential to the execution of the work (*b*). An Act which simply creates a corporation, impliedly gives it the legal attributes of one, among which is a general power to make contracts (*c*). [Even where a corporation is created with certain specifically enumerated powers, it possesses, in addition, by implication, all such as are either necessarily incident to those specified, or essential to the expressed purposes and objects of the corporate existence.\* “In this country, all corporations, whether public or private, derive their powers from legislative grant, and can do no act for which authority is not expressly given, or may not be reasonably inferred. But, if we were to say that they can do nothing for which a

other within a year, etc.; it was held that the intention of the Legislature was to reach all cases where a suit was brought, but the merits of it failed of trial, without the plaintiff's default; and that consequently the case of a discontinuance of a cause for the second time, through the absence of the justice, though not within the terms of the enactment, was within its intention: *Phelps v. Wood*, 9 Vt. 399. Comp. ante, § 327, note 136; also § 110.

(*a*) *Shep. Touchst.* 89; *Roll. Ab. Incidents, A.*

(*b*) *The Clarence R. Co. v. The G. N. of England R. Co.*, 13 M. & W. 721. See, also, *Re Dudley*, 8 Q. B. D. 86.

(*c*) See *Ashbury, &c. Co. v. Riche*, L. R. 7 H. L. 653; *Brough-*

*ton v. Manchester Waterworks*, 3 B. & A. 12; *Shears v. Jacobs*, L. R. 1 C. P. 53, and the cases collected in *S. of Ireland Colliery v. Wardle*, L. R. 3 C. P. 463.

\* *Le Couteulx v. Buffalo*, 33 N. Y. 333; *Memphis v. Adams*, 9 Heisk. (Tenn.) 518. See *Williamsport v. Com'th*, 84 Pa. St. 487, as to the implied power of municipalities to borrow money and issue bonds therefor,—a power, which, as to private or trading corporations, may, as a general proposition, be conceded, unless restrained by their charters or the law of the land: *Ibid.*, p., 493, and may be said to be within the implied powers of a municipal corporation: *Ibid.* p., 494. See 1 Dill., *Mun. Corp.*, § 89.

warrant could not be found in the language of their charters, we should deny them, in some cases, the power of self-preservation, as well as many of the means necessary to effect the essential objects of their incorporation. And therefore, it has been an established principle in the law of corporations, that they may exercise all the powers within the fair intent and purpose of their creation, which are reasonably proper to effect the powers expressly granted."<sup>6</sup> Nor should anything that is fairly incidental to those things which the Legislature has authorized be held *ultra vires*, unless expressly prohibited.<sup>7</sup> Thus it has been decided that, *e. g.*, the grant to a municipality of power to "prevent and extinguish fires," granted, by implication, the power to erect a fire-engine house;<sup>8</sup> of power to "make police regulations or needful by-laws," a power to purchase fire-engines;<sup>9</sup> of power to contract "for lighting" streets, a power to acquire street fixtures, including gas-pipes and lamp-posts, for that purpose;<sup>10</sup> and a grant of power to a railroad company to purchase land in order to procure stone and other material necessary for the construction of its road, a grant of power to purchase land in order to get cross-ties and fire-wood.<sup>11</sup> Indeed, it may be generally said, that, whenever a power is given by statute, everything necessary to make it effectual, everything essential to the exercise of it, is given by implication.<sup>12</sup> Thus, under the Pennsylvania act of 1848, which declared that property accruing to a married woman should be "owned, used and enjoyed" by her as her separate property, it was held, that, as the use and enjoyment referred to must be such as were consistent with the nature and kind of property accrued to the woman, where it consisted, *e. g.*, of a store of liquors and cigars, which could not be used and enjoyed in the same manner,

<sup>6</sup> *Bridgeport v. R. R. Co.*, 15 Conn. 475, 501. As to implied powers of Railway Companies, see *Pierce, Railroads*, Ch. xix.

<sup>7</sup> *Atty.-Genl. v. Great East. Ry. Co.*, L. R. 5 App. Cas. 473. And see *Cook v. Hamilton Co.*, 6 McLean, 112.

<sup>8</sup> *Clarke v. Brookfield*, 81 Mo. 503.

<sup>9</sup> *Van Sicklen v. Burlington*, 27 Vt. 70.

<sup>10</sup> *Nelson v. La Porte*, 33 Ind. 258.

<sup>11</sup> *Mallett v. Simpson*, 94 N. C. 37.

<sup>12</sup> *New York v. Sands*, 105 N. Y. 210; *Com'th v. Conyngham*, 66 Pa. St. 99; *Witherspoon v. Dunlap*, 1 McCord (S. C.) 546.

as, *e. g.*, household furniture or a dwelling house, but were merchandize, and as it was in the nature of merchandize to be sold and exchanged, the power to own and use and enjoy implied, as to such property, the right to trade by them,—in a word, made women merchants.<sup>13</sup> The same language applied to real property was held to give her, by implication, the right to contract, and make her estate liable, for necessary repairs and improvements; for the enactment would be vain without such a power.<sup>14</sup> So, a power given to a married woman to engage in business was held to enable her to borrow money and to purchase real estate wherewith and wherein to commence business, as well as to contract debts in the prosecution of such business when established.<sup>15</sup> And when an act directs a thing to be done, *e. g.*, an increase of the salaries of municipal officers, it authorizes impliedly, without doing so in terms, the performance of whatever is necessary to carry the direction into effect, *i. e.*, an increase of taxation necessary to meet the additional burden imposed.<sup>16</sup> An act authorizing the Comptroller of a county to create a public fund or stock for certain specified purposes, impliedly authorized that officer to employ an agent to negotiate the county bonds provided for by the act, to make an agreement with him for compensation, and to pay him out of the proceeds of the bonds.<sup>17</sup>

<sup>13</sup> *Wieman v. Anderson*, 42 Pa. St. 318. Where an act directed the treasurer of the commonwealth to assign to a certain corporation all the shares of its stock owned by the commonwealth, etc., the corporation thereupon to "hold and dispose of the shares of stock so assigned to it as its absolute property," it was held that the corporation might divide the shares among its stockholders: *Com'th v. B. & A. R. R. Co.*, 142 Mass. 146.

<sup>14</sup> *Lippincott v. Leeds*, 77 Pa. St. 420, 422.

<sup>15</sup> *Frecking v. Rolland*, 53 N. Y. 422. And see *Zurn v. Noedel*, 113 Pa. St. 336; *Bovard v. Kettering*, 101 Id. 181. The grant to married women of power to make notes has been held to imply the power to give bank checks and

due-bills: *Wilderman v. Rodgers*, (Md.) 5 Centr. Rep. 573 (see as to the inclusion of checks in the phrase notes, etc.: *Walker v. Geisse*, 4 Whart. (Pa.) 252; *Hill v. Gaw*, 4 Pa. St. 493); and post, dated checks: *Nash v. Mitchell*, 8 Hun (N. Y.) 471; and to execute notes in blank: *Morrison v. Thistle*, 67 Mo. 596.

<sup>16</sup> *Green v. New York*, 2 Hilt. (N. Y.) 203.

<sup>17</sup> *New York v. Sands*, 105 N. Y. 210. Under an act vesting in District Attorneys "the duties now by law to be performed by deputy attorney-generals," it was held that a writ of quo warranto might issue on the information of a District Attorney to determine the right of certain persons to act as school directors: *Gilroy v. Com'th*, 105 Pa. St. 484.

§ 419. **Powers Implied in Grant of Jurisdiction.**—Where an Act confers a jurisdiction, it impliedly grants, also, the power of doing all such acts, or employing such means, as are essentially necessary to its execution. *Cui jurisdictio data est, ea quoque concessa esse videntur, sine quibus jurisdictio explicari non potuit* (a). So, where an inferior Court is empowered to grant an injunction, the power of punishing disobedience to it by commitment is impliedly conveyed by the enactment; for the power would be useless if it could not be enforced (b). [It is said, that, independently of any express statutory grant of authority, and as a necessary incident to their existence and the exercise of the jurisdiction conferred upon them, courts of record have the power to make rules, not contrary to law, for the regulation of their business,<sup>18</sup> and to punish contempts.<sup>19</sup>] And it is laid down that where a statute empowers a justice to bind a person over, or to cause him to do something, and the person, in his presence, refuses, the justice has impliedly authority to commit him to jail till he complies (c).

(a) Dig. 2, 1, 2. [Thus, where an act conferred upon the comptroller the power to cancel the sale of real estate for state taxes and refund the purchase-money, wherever such sale was invalid and ineffectual to pass title, and, upon receiving evidence thereof, required him so to do, it was held that there was implied the power to receive evidence of the defect and to act thereon, to receive affidavits and administer oaths; that, therefore, the exercise of the power was not confined to cases of invalidity appearing on the face of the proceedings; and that the comptroller could be required by mandamus to hear and determine an application properly made to him for cancellation, etc., under the act: *People v. Chapin*, 105 N. Y. 309; 7 Centr. Rep. 293.]

(b) Exp. *Martin*, 4 Q. B. D. 212. [And a statutory provision making a decree for a deed to operate as a conveyance does not take away the jurisdiction of the court to enforce the execution of the conveyance by process of attachment: *Randall v. Pryor*, 4 Ohio, 424.]

<sup>18</sup> *Fullerton v. Bank*, 1 Pet. 604; *Barry v. Randolph*, 3 Binn. (Pa.) 277; *Vanatta v. Anderson*, Id. 417; *Boas v. Nagle*, 3 Serg. & R. (Pa.) 253; *Risher v. Thomas*, 2 Mo. 98; *Brooks v. Boswell*, 34 Id. 474; *Kennedy v. Cunningham*, 2 Metc. (Ky.) 538.

<sup>19</sup> *U. S. v. New Bedford Bridge*, 1 Woodb. & M. 401. See, also, *Gates v. M'Daniel*, 3 Port. (Ala.) 356; *Randall v. Pryor*, 4 Ohio, 424; *Armstrong v. Beaty*, Cam. & N. (N. C.) 33; and *Lining v. Bentley*, 2 Bay (S. C.) 1, as to such power in justices of the peace: but see contra, *Albright v. Lapp*, 26 Pa. St. 99; *R. v. Bartlett*, 2 Sess. Cas. 291. And see upon this subject, *Cooley, C. L.*, 390, note 3. A surrogate may punish for contemptuous refusal to appear and give evidence, but a defaulting witness cannot, in any case whatever, be brought in by attachment, forcibly, "to testify." *Perry v. Mitchell*, 5 Denio (N. Y.) 537.

(c) 2 Hawk. c. 16, s. 2. [An act investing a court with power of deciding cases of contested election was, in *Handy v. Hopkins*, 59

§ 420. **Other Implications.**—[An act extending the limits of a city so as to embrace within its boundaries certain lands used only for farming purposes, by necessary implication makes these lands subject to taxation for municipal objects.<sup>20</sup> An act making the judgment of the Common Pleas upon certiorari to a justice of the peace final, as regards affirmance or reversal of the justice's judgment, makes the former final also as to the subsequent allowance of a writ of execution for costs accrued on the certiorari.<sup>21</sup>] Where an Act provided that the costs and expenses incident to passing it, should be paid by the Metropolitan Board, but did not state to whom they should be paid, it was held that they were payable to the promoters only, and not to agents and other persons employed by them (*a*). [So, where no time is fixed by a statute within which an appeal allowed by it is to be taken, it is said that a reasonable time is to be understood as allowed,<sup>22</sup> or the time prescribed by a general law regulating

Md. 157, held to give it authority to decide all matters and questions involved in such contest, and, having decided against the pretensions of the contestants, to declare that contestees were *not* duly elected, and that the office was vacant. See, also, *Anderson v. Levely*, 58 Id. 192. *Comp. Ellingham v. Mount*, 43 N. J. L. 470, that a court, under a power of revising contested elections, is confined to the grounds of contest enumerated in the statute, and cannot, *e. g.*, adjudge, in such a proceeding, the constitutionality of the law under which the election was held. And § 527, n. 179.]

<sup>20</sup> *Kelly v. Pittsburgh*, 85 Pa. St. 170. See the dissenting opinion of Agnew, C. J., concurred in by Sterrett, J.

<sup>21</sup> *Palmer v. Lacock*, 107 Pa. St. 346. As to the right to costs in such cases, see *Hartman v. Bechtel*, 1 Woodw. (Pa.) 140. An act declaring that the returns of certain elections "shall be subject to the inquiry, *determination* and *judgment* of the Court of Common Pleas," who shall "proceed on the *merits* thereof, and shall determine *finally* thereon . . . and . . . shall

*immediately* certify to the Governor the decree . . . and in whose favor such contested election shall be *terminated*; and the Governor shall *then* issue the commission," etc.,—necessarily implies the finality of the decree of said court and the absence of revisory power, even by *certiorari*, in the Supreme Court: *Carpenter's Case*, 14 Pa. St. 486; just as a provision making city councils the "final" judges of election returns ousts the jurisdiction of the courts and makes such councils the sole tribunal to determine the legality of the election of their members: *Selleck v. Com. Council of S. Norwalk*, 40 Conn. 359. But see as to a provision making city councils judges of election, but not declaring their decision final, nor making any provision for contesting it, *Echols v. State*, 56 Ala. 181, where such decision was held to confer only a *prima facie* right to the office until ousted by proper legal process in the nature of *quo warranto*.

(*a*) *Wyatt v. Metrop. B. of Works*, 11 C. B. N. S. 744.

<sup>22</sup> *Moore v. Fields*, 1 Oreg. 317. But see *ante*, § 20.

appeals is to be regarded as impliedly adopted."<sup>23</sup>] A private Act which, after annexing a rectory to the deanery of Windsor, recited that the dean's residence at the latter place would oblige his frequent absence from the rectory, and required him to appoint a curate to reside there, was deemed to give him, by implication, an exemption from residence (*a*).

§ 421. **Implied Exercise and Expression of Legislative Judgment.**—[The rule, that, whatever is necessarily or logically involved in an enactment is implied by it, with the same force as if it were expressed, extends also to those cases where the right of legislation is, by the constitution, confined to occasions in which the existence of certain facts shall have been first ascertained by the Legislature. It has been seen that a legislative declaration that a certain improvement authorized by it is for the benefit of adjacent landholders who are, by the act, subjected to taxation to defray its expenses, is conclusive.<sup>24</sup> Similarly, the decision of the Legislature that a railroad is required by public necessity is implied in a grant by it of a charter to construct the same and is conclusive.<sup>25</sup> And where the constitution confines the right of the Legislature to grant special charters to cases for which it may deem the general laws inadequate, the exercise of the judgment is implied in the mere passage of such a charter without any express declaration to that effect.<sup>26</sup> So, where the constitution of a state provided that no act of the Legislature of a public nature should take effect until July 4, next after its passage at a regular session, and that acts passed at a special session should go into operation ninety days after the adjournment of the Legislature that passed them, but added, "If the general assembly deem any law of immediate importance, they may provide that the same shall take effect by publication in newspapers of the State;" it was held that a direction to that effect implied such a determination.<sup>27</sup>]

<sup>23</sup> *State v. Dean*, 9 Ga. 405, comp. ante, § 327.

(*a*) *Wright v. Legge*, 6 Taunt. 48.

<sup>24</sup> *People v. Lawrence*, 36 Barb. (N. Y.) 177; ante, § 375.

<sup>25</sup> *State v. Noyes*, 47 Me. 189.

<sup>26</sup> *Johnson v. Ry. Co.*, 23 Ill. 202.

<sup>27</sup> *State v. Donehey*, 8 Iowa, 396. It was there also held that the act, as published in the newspapers, corresponding with the act on file in the office of the Secretary of

§ 422. **Implications not Extended beyond what is Necessarily Implied.**—But the extension of an enactment by implication is confined to its strictly necessary incidents or logical consequences. When, for instance, a statute requires the performance of a service, it implies no provision that the person performing it shall be remunerated (*a*). [Nor, where the usual compensation is reduced, is there any implication that the claim for the reduced compensation shall have precedence of others.<sup>28</sup>] An Act which empowered justices to discharge an apprentice from his apprenticeship, if ill-treated by his master, would not inferentially empower them to order a return of the premium; for however just it might be that such a return should be made, and convenient that it should be ordered by the tribunal which cancelled the indenture, such a power was not the logical or necessary incident or result of that which was expressly conferred (*b*). Although the 33 & 34 Vict. c. 93 absolved a husband from liability for the antenuptial debts of his wife, and made the latter capable of being a trader, and “liable to be sued for,” and her separate property subject to satisfy, her debts, “as if she had continued unmarried;” a married woman having separate property, was not, as a logical consequence of such liabilities, liable to be made a bankrupt (*c*). [Similarly, under the New Jersey married woman’s act, which gave her merely the right to hold her property free from the control of her husband, it was held that the *jus disponendi* was not a necessary incident of the *jus tenendi*.<sup>29</sup> And under a similar act in Pennsylvania, which gave to married women the power to make their property liable for the payment of necessities purchased by them, it was held that there was, in this grant, no necessary implication of power to give written obligations for the payment of debts thus contracted, or to confess judgment there-

State, was to be deemed the law, although differing from the act as published in the session laws.

(*a*) *Per* Lord Abinger in *Jones v. Carmarthen*, 8 M. & W. 605; *R. v. Hull*, 2 E. & B. 182; *R. v. Allday*, 7 Id. 799. See, also, *Alresford v. Scott*, 7 Q. B. D. 210.

<sup>28</sup> *People v. Williams*, 8 Cal. 97.

(*b*) *R. v. Vandeleer*, 1 Stra. 69; *East v. Pell*, 4 M. & W. 665.

(*c*) *Exp. Holland*, L. R. 9 Ch. 307; *Exp. Jones*, 12 Ch. D. 484. See *Guthrie v. Fisk*, 8 B. & C. 178; *Re Frankland*, L. R. 8 Q. B. 18.

<sup>29</sup> *Naylor v. Field*, 29 N. J. L. 287.



for." Nor does an act giving to the wife the fruits of her own labor imply a right in her to abandon her husband, without his consent, for the purpose of acquiring earnings for her separate use, or to neglect or avoid, for such purpose, the duties the marriage relation imposes upon her." A statute giving half the penalty imposed by it to the complainant does not impliedly give the latter authority to bring an action for the penalty in his own name." Nor would the grant of a power to construct a railway on one side of a town imply a right to make a temporary location on the other side." Nor does a power of sale given to municipal officers imply a power to exchange or barter."]

§ 423. **Protection Implied in Grant, etc., of Powers, Duties, etc.**—If the Legislature authorizes the construction of a work or the use of a particular thing for a particular purpose, the permission carries with it impliedly an exemption from responsibility for any damage arising from the use, without negligence; as, for instance, when haystacks are fired by locomotive engines plying on railways (*a*). So trustees and official persons who are authorized to execute a work, such as to raise a road, to lower a hill, or to make a drain, are impliedly authorized, if necessary for the due execution of their task, to prejudice the rights, or injure the property of third persons (*b*). But when an Act confers such powers,

<sup>30</sup> *Glyde v. Keister*, 32 Pa. St. 85; *Brunner's App.*, 47 Id. 67, 74. See, also, *Swing v. Woodruff*, 41 N. J. L. 469. But see *Williamsport v. Com'th*, 84 Pa. St. 487, where it is said, with reference to a municipal corporation, that the power to contract a debt implies the right to issue the proper acknowledgment, *i. e.*, bonds, therefor.

<sup>31</sup> *Douglas v. Gausman*, 68 Ill. 170. See, also, *Randall v. Randall*, 37 Mich. 563.

<sup>32</sup> *Smith v. Look*, 108 Mass. 139. <sup>33</sup> *Currier v. R. R. Co.*, 11 Ohio St. 228.

<sup>34</sup> *Cleveland v. State B'k*, 16 Ohio St. 236.

(*a*) *R. v. Pease*, 4 B. & Ad. 30; *Vaughan v. Taff Valley R. Co.*, 5 H. & N. 679; 29 L. J. 247; *Freemantle v. London & N. W. R. Co.*,

10 C. B. N. S. 89; 31 L. J. 12; *Blyth v. Birmingham Water-works Co.*, 7 Ex. 212; *Dunn v. Birmingham Canal Co.*, L. R. 8 Q. B. 42; *Hammersmith R. Co. v. Brand*, L. R. 4 H. L. 171; *Cracknell v. Thelford*, L. R. 4 C. P. 629; *Geddis v. Bann Com.*, 3 App. 455, *per Lord Blackburn*. [*Whart., Negligence*, § 869, citing to same effect the following American cases: *Sheldon v. R. R. Co.*, 14 N. Y. 218; *Hinds v. Barton*, 25 Id. 544; *Road v. R. R. Co.*, 18 Barb. (N. Y.) 80; *Phila., etc., R. R. Co. v. Yeiser*, 8 Pa. St. 366; *Frankfort, etc., Turnp. Co. v. R. R. Co.*, 54 Id. 345; *Balt., etc., R. R. Co. v. Woodruff*, 4 Md. 242; *Jefferis v. R. R. Co.*, 3 Houston (Del.) 447. See, also, *Shearman & Redfield, Negligence*, § 332.]

(*b*) *Per Williams, J.*, in *White*.

it also impliedly requires that they shall be exercised only for the purposes for which they were given, and subject to the conditions which it prescribes, and also with due skill and diligence, and in a way to prevent a needless mischief or injury (*a*). A power, for instance, to establish asylums for the sick would not authorize the establishment of a small-pox hospital in such a place or circumstances as to be a common nuisance (*b*). [So, where the state's right of eminent domain is committed to a corporation, and by virtue of the same the latter may lawfully enter upon the land of an individual and build all structures proper to accomplish the purpose of its charter, this power does not justify unskillfulness or unnecessary injury in the mode of performing the work, or in the character of the structures erected."'] And further, as a grant of fish in a pond does not carry with it an authority to dig a trench to let the water out to take the fish, since they can be taken by nets or other devices, without doing such damage (*c*); so, a statute does not give by implication any powers not absolutely essential to the privilege or property granted. An authority to construct a sewer on the land of another, for instance, would not carry with it the right to lateral support from the land, if it was possible to construct an adequate sewer independent of such support (*d*). If land is vested by Act of Parliament in persons for public purposes, a power of conveying away any part of it would not be impliedly granted (*e*). [Similarly, where a railroad company has the right, subject to liability for compensation,

house v. Fellowes, 10 C. B. N. S. 780; Sutton v. Clarke, 6 Taunt. 34; Stainton v. Woolrych, 23 Beav. 225; 26 L. J. 300.

(*a*) Jones v. Bird, 5 B. & A. 837; Grocers' Co. v. Donne, 3 Bing. N. C. 34; Clothier v. Webster, 12 C. B. N. S. 750; 31 L. J. 316; Lawrence v. G. N. R. Co., 16 Q. B. 648; Collier v. Middle Level Commrs., L. R. 4 C. P. 279; Geddis v. Bann Com., 3 App. 430.

(*b*) Metrop. Poor Act, 1867, s. 5; Metrop. Asylum District v. Hill, 6 App. 198; 50 L. J. 358.

<sup>36</sup> P. F. W. & C. Ry. Co. v. Gilleland, 56 Pa. St. 445, 452.

Compare Wharton, Neg., §§ 872, et seqq.; Redfield, Railroad, pp. 157, 170, 171, 454; also, ante, § 251.

(*c*) Finch's Disc. on Law, 63; Gearn v. Baker, L. R. 10 Ch. 355.

(*d*) Metrop. Board v. Metrop. Railway Co., L. R. 4 C. P. 192. See Roderick v. Aston Local Board, 5 Ch. D. 330.

(*e*) Wadmore v. Dear, L. R. 7 C. P. 212; Tipper v. Nichols, 18 C. B. N. S. 121, 34 L. J. 61; Mulliner v. Midland Ry. Co., 11 Ch. D. 611, 48 L. J. 258.

to take land to a certain width, for the construction and operation of its roadway, "after the right has been exercised, the use of the property must be held in accordance with and for the purposes which justified its taking. . . . Hence it is that no one can pretend that a railroad company may build private houses and mills, or erect machinery, not necessarily connected with the use of their franchise, within the limits of their right of way. If it could, stores, taverns, shops, groceries and dwellings might be made to line the sides of the road outside of the track—a thing not to be thought of under the terms of the acquisition of the right of way."<sup>86</sup>]

§ 424. **Implied Obligations.**—The concession of privileges or powers carries with it, often, implied obligations. For instance, an Act which gives a power to dig up the soil of streets for a particular purpose, such as making a drain, impliedly casts on those thus empowered the duty of filling up the ground again, and of restoring the street to its original condition (*a*). If it imposed a liability on one person to keep in repair a work in the possession of another, it would be understood as impliedly imposing on the latter the obligation of giving notice of the needed repair to the party liable (*b*). A public body, authorized to make a bridge or towpath and to take tolls for its use, is impliedly bound to keep it in proper repair, as long as it takes the tolls, and invites the public to use the work; or at least, to give those whom they invite to use it, due warning of the defect which makes it unfit for use (*c*). [So, a city being, under powers given it by its charter, etc., in possession of a public wharf and exercising exclusive supervision and control over it, and

<sup>86</sup> *Lance's App.*, 55 Pa. St. 16, 25. So a grant of a right of way, fifty feet wide, by a city to a railroad over a small strip of land, through a densely populated part of the city, conveys only so much ground as is necessary for the line of the road, and will not carry, by implication, the right to erect, within such line, depots, car-houses, or other structures for the convenience or business of the road: *Allegheny v. R. R. Co.*, 26 Pa. St. 355.

(*a*) *Gray v. Pullen*, 5 B. & S. 970, 34 L. J. 265.

(*b*) *London & S. E. R. Co. v. Flower*, 1 C. P. D. 77; *Makin v. Watkinson*, L. R. 6 Ex. 25. See *Scaltock v. Harston*, 1 C. P. D. 106; *Brown v. G. E. R. Co.*, 2 Q. B. D. 406.

(*c*) *Winch v. Conservators of the Thames*, L. R. 7 C. P. 458, 9 C. P. 378; *Nicholl v. Allen*, 1 B. & S. 934, 31 L. J. 283, 431; *Forbes v. Lee Cons. Board*, 4 Ex. D. 216.

receiving tolls for its use, is bound to keep it in proper condition for use.<sup>27</sup> And, of course, where a statute authorizes a person to build a road and collect tolls thereon, requiring him to macadamize it, and declaring a forfeiture of all rights acquired under it upon failure to comply with the act, he cannot be permitted to collect tolls when he has macadamized only part of the road.<sup>28</sup>] If statutory authority is given to persons, primarily for their own benefit and profit, rather than for any advantage which the public may incidentally derive, such as to cut through a highway and throw a bridge over the cutting, or to substitute a new road for the old one; the burden of maintaining the new work in repair would impliedly be cast on them, and not on the county or parish (*a*). Another duty which would also be impliedly imposed on them by such an enactment would be that of protecting the public from any danger attending the use of the new work. If it was a swing bridge, for instance, they would be bound to take due precautions to prevent persons from attempting to cross it, while it was open (*b*). If the work was a railway, crossing a highway on a level, they would be impliedly bound to keep the crossing in a proper state to admit of the use of the highway by carriages, without damage to them (*c*); [and, at an established level crossing, where there is a footpath, to place lights at night.<sup>29</sup>] And this implied obligation would not be excluded on the principle *expressum facit cessare tacitum*, by the fact that certain duties are expressly imposed by statute on railway companies who make such crossings; ex. gr., to erect and maintain gates where the public road crosses the railway, and to employ men to open and shut them, and to keep them closed except when carriages have to cross (*d*). So, notwithstanding all such express provisions, the company would be bound, by implication, to prevent all passage along the portion

<sup>27</sup> *Pittsburgh v. Grier*, 22 Pa. St. 54.

<sup>28</sup> *State v. Curry*, 1 Nev. 251.

(*a*) *R. v. Kent*, 13 East, 220; *R. v. Lindsay*, 14 East, 317; *R. v. Kerrison*, 8 M. & S. 526; *R. v. Ely*, 15 Q. B. 827; *North Staffordshire R. Co. v. Dale*, 8 E. & B. 836; *Leach v. North Staffordshire R.*

*Co.*, 29 L. J. M. C. 151.

(*b*) *Manley v. St. Helen's Co.*, 2 H. & N. 840, 27 L. J. 159.

(*c*) *Oliver v. N. E. R. Co.*, L. R. 9 Q. B. 409.

<sup>29</sup> *Whart.*, Neg., § 808a, and cases cited in notes to same.

(*d*) *Id.*; *G. E. R. Co. v. Wanless*, L. R. 7 H. L. 12.

of the highway thus intersected, when it was dangerous to cross (a). [And even where a company, having the right to cut through the street of a city, was not bound by its charter to put up barriers for the protection of travelers upon the street, it was held liable for the neglect of its employees in not putting up the barriers at night, which the company had voluntarily placed there for safety.<sup>40</sup> "It is not true that all the defendant's duties and liabilities are created and prescribed by the act of incorporation. Corporations as well as individuals, by the principles of the common law, are bound so to exercise their rights as not to injure others. The principle, *sic utere tuo ut alienum non laedas*, is of universal application."<sup>41</sup>] But power to pull down the wall of a house without causing unnecessary inconvenience would not impliedly involve the obligation of putting up a hoarding for the protection of the rooms exposed by the demolition (b).

§ 425. **One Duty may Imply Another in Same Person.**—Sometimes the express imposition of one duty impliedly imposes another. Thus, when it was enacted that no license should be refused except on one or more of four specified grounds, the obligation was imposed by implication on the justices, of stating on which of the specified grounds they based their refusal (c). The Ballot Act of 1872, which imposes, in express terms, certain specific duties on the presiding officers at polling stations, casts also on those officers, by implication, the duty of being present at their stations during an election, and of providing the voters with voting papers bearing the official mark required by the Act (d).

§ 426. **Right or Duty in One may Imply Duty in Another.**—A duty or right imposed or given to one, may also cast by

(a) *Lunt v. London & N. W. R. Co.*, L. R. 1 Q. B. 277.

<sup>40</sup> *Lowell v. B. & L. Corp'n*, 1 Am. Railw. Cas. 289, cited in *P. F. W. & C. Ry. Co. v. Gilleland*, 56 Pa. St. 445, 452.

<sup>41</sup> *Ibid.*

(b) *Thompson v. Hill*, L. R. 5 C. P. 564. [*Comp. Davis v. Ry. Co.*, 2 Engl. Ry. Cas. 225, cited in *P. F. W. & C. Ry. Co. v. Gille-*

land, *ubi supra*, where the company was held liable for negligence in making an excavation near to another's house, which caused it to fall upon the house of the plaintiff and injure it.]

(c) 32 & 33 Vict. c. 27, s. 8; *R. v. Sykes*, 1 Q. B. D. 52; *Exp. Smith*, 3 Q. B. D. 374.

(d) *Pickering v. James*, L. R. 8 C. P. 489.

implication a corresponding burthen on another, as in the case of the proviso in the Commission of the Peace, requiring the Quarter Sessions not to give judgment in cases of difficulty unless in the presence of one of the Judges of Assize; which impliedly requires the judge to give his opinion (*a*). So, the Charitable Trusts Act, 1855, which enacts that it shall not be lawful for the trustees of a charity to make any grant otherwise than (among other things) with the approval of the Charity Commissioners, was considered as requiring the Commissioners to give their approval in a case where the grant was made before the Act was passed (*b*).

§ 427. **Grant of Right to One may Imply Right in Another.**—The grant of a privilege or of property to one, sometimes impliedly gives a right to another person. Thus, an Act which empowered a hospital to take and hold lands by will, gift, or purchase, without incurring the penalties of the Mortmain Acts, was held to empower persons to devise or convey lands to it; it being considered that the Act would otherwise be nugatory (*c*). [An act empowering a city to subscribe its bonds for a certain railroad company's stock, by necessary implication confers authority upon the company to receive the subscription.<sup>42</sup>] And yet an Act which gave one railway company power to purchase certain lands and to construct a railway, according to the deposited plans and books of reference, would not give by implication to another company the correlative power to sell any of those lands to it (*d*).

§ 428. **Implied Conditions in Grant of Judicial Powers.**—Again, in giving judicial powers to affect prejudicially the rights of person or property, a statute is understood as silently implying, when it does not expressly provide, the condition or qualification that the power is to be exercised in accordance with the fundamental rules of judicial procedure, such, for

(*a*) *Per cur.* in *R. v. Chantrell*,  
L. R. 10 Q. B. 587.

(*b*) *Moon v. Church*, 1 Ch. D.  
447.

(*c*) *Perring v. Trail*, 18 Eq. 88,

*Comp. Nethersoll v. Indig. Blind*,  
L. R. 11 Eq. 1.

<sup>42</sup> *Clark v. Janesville*, 10 Wis.  
136.

(*d*) *R. v. S. Wales R. Co.*, 14 Q.  
B. 902.

instance, as that which requires that, before its exercise, the person sought to be prejudicially affected shall have an opportunity of defending himself (*a*). On this ground, under the 4 & 5 W. 4, c. 76, which authorizes justices' "at their just and proper discretion" to order out-door relief to an aged or infirm pauper who is unable to work, no such order could be made without summoning those on whom the order was to be made (*b*). So, where an Act authorized justices, where it appeared that the appointment of special constables had been occasioned by the behavior of persons employed by railway or other companies, in executing public works, to make an order on the treasurer of the company to pay the special constables for their services, which order, if allowed by a Secretary of State, should be binding on the company; it was held that no such order could be validly made without giving the company notice, and an opportunity of being heard against it (*c*). So, where a Colonial enactment authorized the Governor to declare a lease forfeited, if it was proved to the satisfaction of a Commissioner that the lessee had failed to reside on the demised land, the Commissioner could not lawfully be satisfied without summoning the lessee and holding a judicial inquiry (*d*). The Metropolitan Local Management Act, which requires that before the foundations of a building are laid, a seven days' notice shall be given to the district board, and authorizes that board to demolish any building erected without such notice, was construed as impliedly imposing on the board the condition of giving the presumed defaulter a hearing, before proceeding to the demolition of his building; and a district board, which had confined itself to the letter of the Act, and had demolished a building respecting which it had received no notice, without first calling on the owner to show cause against its doing so, was held liable in an action, as a wrong doer (*e*). A

(*a*) *Bagg's Case*, 11 Rep. 99; *R. v. Univ. of Cambridge*, Stra. 557; *Emerson v. Newfoundland*, 8 Moo. P. C. 157; *Thorburn v. Barnes*, L. R. 2 C. P. 384; *Re Pollard*, L. R. 2 P. C. 106; *R. v. Jenkins*, 3 B. & S. 116, 32 L. J. M. C. 1. [Comp. ante, §§ 147, 262.]

(*b*) *R. v. Totnes Union*, 7 Q. B. 690.

(*c*) 1 & 2 Vict. c. 80; *R. v. Cheshire Lines Committee*, L. R. 8 Q. B. 344.

(*d*) *Smith v. R.*, 3 App. 614.

(*e*) 18 & 19 Vict. c. 120; *Cooper v. Wandsworth Board*, 14 C. B. N. S. 180, 32 L. J. 185.

statute which required justices to issue a distress warrant to enforce a rate or other charge, even though it directed them to issue it "on proof of demand and non-payment," would nevertheless be construed as impliedly requiring that they should not do so, without first summoning the party against whom it was demanded, and giving him a hearing against the step proposed to be taken against him (a). A power to remove a person from his office or employment for lawful cause only, would, on the same principle, involve the condition that it was to be exercisable only after a due hearing, or the opportunity of being heard, had been given to the person proposed to be removed (b). But it would, of course, be different if the person was removable arbitrarily, and without any cause being assigned (c). It is obvious that where an act which creates a new jurisdiction, gives any person dissatisfied with its decision an appeal to another judicial authority, which is empowered to confirm or annul the decision, as to it shall appear just and proper, the right of being heard in support of his appeal is impliedly given to the appellant (d). Under the provision of the first County Court Act (8 & 9 Vict. c. 95), which empowered the Judge to summon a judgment debtor, and, if satisfied that he had the means of paying his debt, to order him to pay it either in one sum or by instalments, and if he failed to obey, to commit him to jail; it was held that an order to pay by future instalments, and in default of paying any of them to

(a) See *Harper v. Carr*, 7 T. R. 270; *R. v. Hughes*, 3 A. & E. 425; *Painter v. Liverpool Gas Co.*, Id. 433. [It would seem that a similar implication would have to be made, in this country, in the case of similar statutes, under the various constitutional provisions forbidding the taking of a man's property except by due process of law, which implies notice and hearing: *Craig v. Kline*, 65 Pa. St. 399; *Philadelphia v. Scott*, 81 Id. 80; *Pennoyer v. Neff*, 95 U. S. 714; *Davidson v. New Orleans*, 96 Id. 97; *South Platte Land Co. v. Buffalo*, 7 Neb. 253; *Zeigler v. R. R. Co.*, 58 Ala. 594; *Wright v. Cradlebaugh*, 8 Nev. 341; *Taylor v. Porter*, 4 Will (N. Y.) 140. As

applied to taxation, see *McMillen v. Anderson*, 95 U. S. 37; *Pearson v. Yewdall*, Id. 294; *Stewart v. Palmer*, 74 N. Y. 183; *Fox's App.*, 112 Pa. St. 337; *State v. Allen*, 2 McCord (S. C.) 55; *Cooley, Tax'n*, 262.

(b) *R. v. Smith*, 5 Q. B. 614. [See ante, § 148.]

(c) *Exp. Teather*, 1 L. M. & P. 7; *R. v. Darlington School*, 6 Q. B. 682; *Exp. Sandys*, 4 B. & Ad. 863.

(d) *R. v. Archbishop of Canterbury*, 1 E. & E. 545, 28 L. J. 154. See other instances, *Re Phillips' Charity*, 9 Jur. 959; *Re Fremington School*, 10 Jur. 512; *Davenport v. R.*, L. R. 3 App. 115.



be committed, was invalid ; for it made the debtor liable to imprisonment for not making a payment at a future time, without then having an opportunity of defending himself. As the language of the Act was not inconsistent with the general principle that a person ought not to be punished without having had an opportunity of being heard, it was construed as tacitly embodying it. The Judge could not properly exercise any discretion until the time of commitment (*a*).

It would be different where the statute gave a power of immediate commitment in default of immediate payment (*b*). And again, if the opportunity of defence was provided at another stage, there would be no adequate ground for thus implying the condition in question. For instance, when a statute provided that if a rent-charge was in arrear, it might be levied by distress, and that if it remained in arrear for forty days, and there was no distress, a Judge, upon an affidavit of these facts, might order the sheriff to summon a jury to assess the arrears unpaid ; it was held that such an order might well be made *ex parte*. The party subject to prejudice had his opportunity of defence before the sheriff (*c*). So, where an Act authorized justices to inquire and adjudge the settlement of a pauper lunatic, and to make an order on his parish to pay for his maintenance, and empowered the parish to appeal against any such order ; it was held that the order might be made without giving the parish sought to be affected notice of the intended inquiries (*d*).

§ 429. An Act which empowers two or more justices, or other persons (*e*), to do any act of a judicial, as distinguished from a ministerial nature, impliedly requires that they should all be personally present and acting together in its performance, whether to hear the evidence, or to view when

(*a*) See *Kinning's Case*, 10 Q. B. 730, 4 C. B. 507 ; *Buchanan v. Kinning*, 8 C. B. 271, 2 L. M. & P. 526 ; *Abley v. Dale*, 10 C. B. 62, 1 L. M. & P. 626. See, also, *Heskeith v. Atherton*, L. R. 9 Q. B. 4 ; *Lovering v. Dawson*, L. R. 10 C. P. 711.

(*b*) *Arnott v. Dimsdale*, 2 E. & B. 580, 22 L. J. M. C. 161.

(*c*) *Re Hammersmith Rent Charge*, 4 Ex. 87, 7 D. & L. 41. [Compare, also, *Fox's App.*, 112 Pa. St. 337, 357.]

(*d*) *Exp. Monkleigh*, 5 D. & L. 404, 17 L. J. M. C.

(*e*) So, directors of companies, *D'Arcy v. Tamar R. Co.*, L. R. 2 Ex. 158 ; *Cook v. Ward*, 2 C. P. D. 255.

they are to act on personal inspection (a); to consult together, and form their judgment (b). [The same rule applies to officers intrusted with the management of corporations, whether private or municipal. When they propose to do any deliberative act, their powers are to be exercised only when duly assembled, and acting as a body.<sup>44</sup> It follows that of any special meeting notice must, if possible, be given to every member of the board entitled to a voice in its deliberations.<sup>45</sup> Nor does a provision in the charter or by-laws, that a majority shall form a board for the transaction of business change this rule;<sup>46</sup> and if no mode of warning is prescribed therein, personal notice may be given.<sup>47</sup> But the absence of one member, entitled to be present, but not notified, vitiates the proceeding.<sup>48</sup> Such acts, therefore, in order to be valid, and to bind absent members, must be done at a regular stated meeting, or a regular adjourned meeting, or if the meeting be special, notice is necessary, and, in the absence of any other prescribed kind of notice, it must be personally served, if practicable, upon every member entitled to be present.<sup>49</sup>] When the act to be performed is ministerial, it is not necessary, on general principles, that the persons authorized to do it should meet together for the purpose; and the statute which gave such authority would therefore not be construed as impliedly requiring it (c).

§ 430. **New Jurisdiction how to be Exercised.**—When a new jurisdiction is given to an existing Court to deal with new matter in a different mode and a different procedure, it is

(a) *R. v. Cambridge*, 4 A. & E. 111.

(b) *Billings v. Prince*, 2 W. Bl. 1017; *R. v. Hamstall Redware*, 3 T. R. 380; *R. v. Forrest*, Id. 88; *R. v. Stotfold*, 4 T. R. 596; *R. v. Winwick*, 8 T. R. 454; *R. v. Great Marlow*, 2 East, 244; *Battye v. Gresley*, 8 Id. 319; *Grindlay v. Barker*, 1 B. & P. 229; *Cook v. Loveland*, 2 Id. 31; *R. v. Mills*, 2 B. & Ad. 587; *R. v. Totnes*, 11 Q. B. 80; *R. v. Aldborough*, 13 Q. B. 190.

<sup>44</sup> See cases in note (c) preceding page; *Gashwiller v. Willis*, 38 Cal. 11; *Conro v. Iron Co.*, 12

*Barb. (N. Y.)* 27; *McCullough v. Moss*, 5 Denio (N. Y.) 567. But see *Bank of Middlebury v. R. R. Co.*, 30 Vt. 159; *Bradstreet v. Bank*, 42 Id. 128.

<sup>45</sup> *Pike Co. v. Rowland*, 94 Pa. St. 238, 247.

<sup>46</sup> *Ib.*, cit. *Harding v. Vandewater*, 40 Cal. 77.

<sup>47</sup> *Cit. Stow v. Wyse*, 7 Conn. 214.

<sup>48</sup> *Cit. Smyth v. Darley*, 2 H. L. Cas. 789, and referring to *People v. Batchelor*, 22 N. Y. 128.

<sup>49</sup> *Pike Co. v. Rowland*, supra.  
(c) *Re Hopper*, L. R. 2 Q. B. 367.

understood, unless the contrary be expressed or plainly implied, to be intended to be exercised according to the general inherent powers of the Court (a). [And wherever a judge is allowed or directed to use his legal discretion—and all discretion conferred upon courts is legal discretion<sup>49</sup>—upon a certain state of facts, he can only do so after those facts have been judicially made known to him, i. e., by legal proof.<sup>50</sup>] It has been already mentioned that when a power is conferred to do some act of a judicial nature, or of public concern and interest, there is implied an obligation to exercise it, when the occasion for it arises (b). This implied obligation is usually said to modify the language creating the power, when permissive, by making it imperative; but it seems to be a matter of implied enactment, rather than of verbal interpretation.

§ 431. **Distinction between Imperative and Directory Provisions.**—When a statute requires that something shall be done, or done in a particular manner or form, without expressly declaring what shall be the consequence of non-compliance, the question often arises, what intention is to be attributed by inference to the Legislature. Where, indeed, the whole aim and object of the Legislature would be plainly defeated if the command to do the thing in a particular manner did not imply a prohibition to do it in any other, no doubt can be entertained as to the intention. The enactment, for instance, of the Metropolitan Building Act (c), that the walls of buildings shall be constructed of brick, stone, or other incombustible material, though containing no prohibitory words, obviously prohibits by implication and makes illegal their construction with any other (d). [Where an act in relation to certain claims against the state, otherwise not allowable, required them to be presented within a certain time, thereby, indeed, making a distinction between these and ordinary claims, as to the time of presentment, it was

(a) Dale's Case, 6 Q. B. D. 450.

<sup>49</sup> See ante, § 147.

<sup>50</sup> Madden v. Fielding, 19 La. An.

505.\* Hence an ex parte order for alimony to the wife, the plaintiff in a divorce proceeding, was

annulled and rescinded: Ibid.

(b) See ante, §§ 307-308, 313-314, 424, 428.

(c) 18 & 19 Vict. c. 122, s. 12.

(d) Stevens v. Gourley, 7 C. B. N. S. 99, 29 L. J. 1.

\* See *Addenda* to § 150.

held that presumptively that limitation was intended to be material and consequently that it must be followed." Under an act directing that written and sealed bids shall be received until a certain day, upon which they are to be opened, it was held that all bids coming in after that day must be rejected."<sup>51</sup> Again, where compliance is made, in terms, a condition precedent, to the validity or legality of what is done; as when, for example, the deed of a married woman was to take effect "when" the certificate of her acknowledgment of it was filed (*a*); or where it was provided that no appeal should be entertained "unless" certain rules were complied with (*b*); [or where the doing of a thing was prohibited "until" another had been done;]<sup>52</sup> or where certain certificates were declared transferable "only" in a certain prescribed manner;]<sup>53</sup> the neglect of the statutory requisites would obviously be fatal.

But the reports are full of cases without any such indications of intention; in some of which the conditions, forms, or other attendant circumstances prescribed by the statute have been regarded as essential to the act or thing regulated by it, and their omission has been held fatal to its validity; while in others, such prescriptions have been considered as merely directory, the neglect of which did not affect its validity, or involve any other consequence than a liability to a penalty, if any were imposed, for breach of the enactment."

<sup>51</sup> *Corbett v. Bradley*, 7 Nev. 106.

<sup>52</sup> *Webster v. French*, 12 Ill. 302. *Comp. Free Press Ass'n v. Nichols*, 45 Vt. 7; post, § 436.

(*a*) 3 & 4 W. 4, c. 74, s. 85; *Jolly v. Hancock*, 7 Ex. 820, 23 L. J. 38.

(*b*) 32 & 33 Vict. c. 71; *Re Dickinson*, 51 L. J. Ch. D. 736.

<sup>53</sup> *Slayton v. Hulings*, 7 Ind. 144.

<sup>54</sup> *Union B'k v. Laid*, 2 Wheat. 390.

<sup>55</sup> The distinction between these two classes of statutes or statutory provisions is ordinarily expressed by denominating the latter "directory," the former "imperative," or, in this country, more usually, "mandatory." "A statute is termed directory when a part or all

of its provisions operate merely as advice or direction to the official or other person who is to do something pointed out, leaving the act or omission not destructive of the legality of what is done in disregard of the direction:" *Bish., Wr. L.*, § 255. "A statute is called mandatory when, if not all its provisions are complied with according to their terms, the thing done is, as to it, void:" *Id.*, § 254. These descriptions accurately state the results of action and non-action in conformity with or disregard of the provisions of statutes which are either directory or mandatory. But to answer the purposes of definitions, it would seem to be more logical, as well as precise, to say, that a statute or statutory provision is directory when the

The propriety, indeed, of ever treating the provisions of any statute in the latter manner has been sometimes questioned (a); but, [whilst it must be conceded, that, the power to declare a statute to have merely directory force verges so closely upon legislative discretion as to be exercisable by courts only with reluctance and in extraordinary cases,<sup>56</sup> it is nevertheless] justifiable in principle as well as abundantly established by numerous authorities.<sup>57</sup>

§ 432. **Tests. Negative and Affirmative Words.**—[It has been intimated that affirmative words relating to the manner in which power or jurisdiction vested in a public officer or body is to be exercised, and not to the limits of the power or jurisdiction itself, may, but negative words going to the power or jurisdiction itself cannot, be directory;<sup>58</sup> and that, in general, negative words will make a statute imperative.<sup>59</sup> Accordingly, where an act directed that no debt or contract should be binding upon a city unless it be authorized by ordinance, and an appropriation sufficient to pay it be previously made by councils, a clerk employed by one of the municipal boards at a salary of \$2,000, councils having appropriated only \$1,400 for that purpose, could recover nothing beyond the latter sum from the city;<sup>60</sup> and under an act declaring that no man shall be permitted to vote at an elec-

Legislature intended that strict compliance with it should be left to the discretion of the party empowered to act under it and the convenience and necessities of the occasion upon which it was to be applied, and did not intend that a failure to exercise the power conferred, or a failure of exact conformity with all the prescribed details in the execution of it should render the same void; whilst a mandatory statute or provision would be one which the Legislature intended to be strictly complied with, contemplating an exercise of the power conferred in it at all events and exact conformity with the prescribed details in the execution of it as a condition of the legality and validity of the same.

(a) *Per* Martin, B., in *Bowman v. Blyth*, 7 E. & B. 47, 27 L. J. 22;

*Sedgwick on Interp. of Stats.* 375.

<sup>56</sup> *Dryfus v. Bridges*, 45 Miss. 247,—and, it is added, never where the act or omission can by any possibility work advantage or injury, however slight, to any one affected by it. And see *Best v. Gholson*, 89 Ill. 465.

<sup>57</sup> If a statute is directory as to the principal affected by it, it is equally so as to his sureties and those incidentally affected: *Looney v. Hughes*, 30 Barb. (N. Y.) 605.

<sup>58</sup> *Per* Sharswood, J., in *Bladen v. Philadelphia*, 60 Pa. St. 464, 466. See, also, *Dryfus v. Bridges*, supra; *State v. Baker*, 9 Rich. Eq. (S. C.) 521; *State v. Harris*, 17 Ohio St. 608.

<sup>59</sup> *Re McDonough's Election*, 105 Pa. St. 488, 494, citing *State v. Hilmantel*, 21 Wis. 566.

<sup>60</sup> *Bladen v. Philadelphia*, supra.

tion whose name is not upon the registry list, unless he shall make certain proofs, required by the act, of his right to vote, it was held that preliminary proof, in the manner required by the act, of his qualifications was essential to constitute an unregistered elector a legal voter, and that, such proof not having been made before the vote was received, it could not be made on the trial of a contested election so as to legalize the vote.<sup>61</sup> And similarly, where there was no registry of the voters of a town, and none of the persons who voted there at an election furnished affidavits required by law to entitle the vote of an unregistered elector to be received, the whole vote of the town was rejected.<sup>62</sup> But this effect was denied to a similar enactment notwithstanding its express negative terms, on the ground that the prohibition of the statute was directory.<sup>63</sup> And it would seem, that, as a rule of universal application, the principle stated cannot be sustained.<sup>64</sup> Thus,] the usual provision in the commission of the peace that no justice named in it shall be capable of acting or authorized to act unless he shall have taken the oaths required by law, would lead to intolerable inconvenience and injustice, if it were imperative and struck with invalidity every act of an unqualified justice. If his acts were held void, it, was pointed out by the King's Bench, all persons who acted in the execution of a warrant issued by him, would act without authority ; a constable who arrested, and a gaoler who received the arrested person, under it, would be trespassers. Resistance to them would be lawful ; everything done by them would be unlawful ; and a constable, and the persons aiding him might become amenable even to a charge of murder, for acting under an authority which they reasonably considered themselves bound to obey, and of the invalidity of which they were wholly ignorant (a). Such consequences could not reasonably be supposed to have been

<sup>61</sup> *Re McDonough's Election*, supra.

<sup>62</sup> *State v. Stumpf*, 28 Wis. 630: though such would not be the effect of the reception of votes under a defective and invalid registry list: *State v. Baker*, 38 Id. 71.

<sup>63</sup> *Clark v. Robinson*, 88 Ill.

498 ; *Dale v. Irwin*, 78 Id. 172.

<sup>64</sup> See *Potter's Dwaris*, p. 224, note.

(a) 18 Geo. 2, c. 20; 51 Geo. 3, c. 36 ; *Margate Pier Co. v. Hannam*, 3 B. & A. 266. *Comp. R. v. Verelst*, 3 Camp. 433.

intended; the interest of the public required that the acts should be sustained; and the just conclusion was that the Legislature intended by the prohibition only to impose a penalty for its infringement. [Moreover, it is to be observed, that in the instances above cited, in which the principle that negative words exclude discretion was applied, the decision might well have been put upon one or more of the grounds previously stated<sup>66</sup> as indicating a mandatory intention.<sup>67</sup> Thus, concerning the construction of the registry law last referred to, as directory only, it is said by one court, disapproving that construction: "Unless there is some provision in the statute authorizing election officers to receive a vote on their own knowledge of the qualifications of the person who offers it, such judicial construction nullifies the law made to prevent fraudulent voting."<sup>68</sup> Similarly, a provision in an act relating to boroughs, that all ordinances "shall be recorded in a book . . . which shall be free to public inspection, and no ordinance . . . shall be carried into operation in less than two weeks after the same shall be so recorded," was held to be clearly mandatory as expressing a condition upon which any ordinance was to go into effect, and before the performance of which no ingenuity could make any ordinance operative.<sup>69</sup> It is undoubtedly true, however, that an intention to make a provision merely directory is more rarely to be found under such negative words.<sup>70</sup> As an illustration may be cited the decision under a statute that provided (1) that all resolutions and reports of committees of a certain description should be published in all the newspapers employed by the municipality to which the act related; and (2) that such resolutions and reports "shall not be passed or adopted until after such notice has been published at least two days." It was held that the former provision, *i. e.*, that the publication must be in *all* the newspapers, was to be regarded as directory only, and its omission or neglect would not vitiate the ordinance, but that the

<sup>66</sup> See ante, § 431.

<sup>67</sup> See, also, post, § 434.

<sup>68</sup> *Re McDonough's Election*, supra, at p. 495.

<sup>69</sup> *Verona's App.*, 108 Pa. St. 83, 89.

<sup>70</sup> See *Bish., Wr. L.*, § 255a.

second provision, that it must be published in some newspaper at least two days, was imperative.<sup>70</sup>]

§ 433. **Duty—Privilege.**—It has, indeed, been said that no rule can be laid down for determining whether the command is to be considered as a mere direction or instruction involving no invalidating consequence in its disregard, or as imperative, with an implied nullification for disobedience, beyond the fundamental one that it depends on the scope and object of the enactment (*a*). It may, perhaps, be found generally correct to say that nullification is the natural and usual consequence of disobedience, [and that where an act requires a thing to be done in a particular manner, that manner alone must be adopted.<sup>71</sup>] But the question is in the main governed by considerations of convenience and justice (*b*), and when nullification would involve general inconvenience [or great public mischief,<sup>72</sup>] or injustice to innocent persons, or advantage to those guilty of the neglect, without promoting the real aim and object of the enactment, such an intention is not to be attributed to the Legislature. In the first place, a strong line of distinction

<sup>70</sup> *Matter of Douglas*, 58 Barb. (N. Y.) 174, the phrase "at least two days" being construed as meaning, not that there must be two publications on two separate days, but that two days must elapse between the introduction and publication of the ordinance, and its final passage: *Ibid*.

(*a*) *Per* Lord Campbell in *Liverpool Borough Bank v. Turner*, 2 DeG., F. & J. 502, 30 L. J. 379; *per* Lord Penzance in *Howard v. Boddington*, 2 P. D. 211. [Bish., Wr. L., § 255. In *Kellogg v. Page*, 44 Vt. 356, it is intimated that this, like other questions arising in the construction of statutes, is one of intention on the part of the Legislature. And see *Corbett v. Bradley*, 7 Nev. 106.]

<sup>71</sup> *Comm'rs v. Gaines*, 3 Brev. (S. C.) 396. See, also, *Best v. Gholson*, 89 Ill. 465. In Pennsylvania, it is provided by statute, 21 March 1806, § 13, that, "in all cases where a remedy is provided, or duty enjoined, or anything

directed to be done by any act or acts of assembly . . . the directions of the said acts shall be strictly pursued." See as to the application of this act: *McMichael v. Skilton*, 13 Pa. St. 215, 217 (partition); *Com'th v. Garrigues*, 28 Id. 9, 12 (elections: see, with this case, *State v. Marlow*, 15 Ohio St. 114, where, as in *Com'th v. Garrigues*, it was held that the statutory mode of contesting elections was exclusive of common law proceeding by mandamus, and was binding upon the state, the governing statute, in that case, being according to the requirement of the constitution); *Beltzhoover v. Gollings*, 101 Id. 293, 295; *White v. McKeesport*, Id. 394, 401 (remedies against municipalities); *Campbell v. Grooms*, Id. 481, 483 (against poor district).

(*b*) See *per* Lush, J., in *R. v. Ingall*, 2 Q. B. D. 208.

<sup>72</sup> *Dryfus v. Bridges*, 45 Miss 247.



may be drawn between cases where the prescriptions of the Act affect the performance of a duty, and where they relate to a privilege or power (*a*). Where powers or rights are granted, with a direction that certain regulations or formalities shall be complied with, it seems neither unjust nor inconvenient to exact a rigorous observance of them as essential to the acquisition of the right or authority conferred; and it is therefore probable that such was the intention of the Legislature. But when a public duty is imposed, and the statute requires that it shall be performed in a certain manner, or within a certain time, or under other specified conditions, such prescriptions may well be regarded as intended to be directory only, when injustice or inconvenience to others who have no control over those exercising the duty, would result, if such requirements were essential and imperative.

§ 434. **Regulations, etc., of Acts conferring Powers, Privileges, etc., Imperative.**—Taking the former class of cases, it seems that when a statute confers a right, privilege, or immunity, the regulations, forms, or conditions which it prescribes for its acquisition are imperative, in the sense that non-observance of any of them is fatal, [upon the principle, applicable alike to contracts and statutes, that a party cannot claim the benefits conferred, and at the same time repudiate the obligations imposed by such."'] Thus, where an Act gave to the designers of prints the sole right of printing them for fourteen years after the day of publication, adding, "which (day) shall be truly engraved, with the name of the proprietor, on each plate;" it was held that the neglect to comply with this provision was fatal to the copyright (*b*). So, under the enactment that no proprietor of a copyright should be entitled to sue for its infringement, unless he had made an entry at Stationers' Hall of the title and time of the first publication of the book, and the name and abode of the publisher, it was held that a suit was not maintainable, where the day of publication was not stated truly, or

(*a*) See *per* Denman, J., in *Caldow v. Pixell*, 2 C. P. D. 506.

<sup>73</sup> *Burrows v. Bashford*, 22 Wis. 103.

(*b*) 8 Geo. 2, c. 13; *Newton v. Cowie*, 4 Bing. 234; *Brooks v. Cock*, 3 A. & E. 141; *Avanzo v. Mudie*, 10 Ex. 203.

only the month was stated; or the publishers were not described correctly, that is, neither by the style of the firm, nor by the names of the individual partners (*a*). [So, an omission to comply with any one of the requirements of a copyright law,—depositing of the title, publishing the fact of entry, delivery of a copy of the published work, etc.,—was held to be fatal to the copyright."'] The innkeeper whose common law liability for the goods of his guests is limited, if he posts up a notice as required by the 26 & 27 Vict. c. 41, does not obtain the exoneration, if his notice is inaccurate in any material particular (*b*). The Act which, in authorizing the confinement of lunatics, prohibited their reception in asylums without medical certificates in a given form, setting forth several particulars, and among them, the street and number of the house where the supposed lunatic was examined, made a strict compliance with those provisions imperative; so that a certificate which omitted the street and number of the house where the examination took place, was held insufficient to justify the detention of the lunatic (*c*). When a company or public body is incorporated or established by statute for special purposes only, and is altogether the creature of statute law, the forms prescribed for its acts and contracts are imperative and essential to their validity (*d*). [To this class of statutes belong also those

(*a*) 5 & 6 Vict. c. 45; *Low v. Routledge*, 33 L. J. Ch. 725; *Mathieson v. Harrod*, L. R. 7 Eq. 270; *Henderson v. Maxwell*, 5 Ch. D. 892, 46 L. J. 891.

<sup>74</sup> See *Wheaton v. Peters*, 8 Pet. 591; *Ewer v. Coxe*, 4 Wash. 487; *Jollie v. Jacques*, 1 Blatchf. 618; *Baker v. Taylor*, 2 Id. 82.

(*b*) *Spicer v. Bacon*, 2 Ex. D. 463. See *Gregson v. Potter*, 4 Ex. D. 142; *Mather v. Brown*, 1 C. P. D. 596.

(*c*) 16 & 17 Vict. c. 96; *R. v. Pinder*, 24 L. J. Q. B. 148. *Comp. Re Shuttleworth*, 9 Q. B. 651. Where it was enacted that a person who objected to a voter's qualification might be heard in support of his objection, if he had given notice to the voter; and it was provided that, besides the ordinary way of serving it, the

notice might be sent by post to his place of abode "as described" in the list of voters prepared by the clerk of the peace; it was held that to send by post a notice, not to the address so given, which was incorrect, but to the true address, was not a compliance with the Act, and therefore that the objector could not be heard on mere proof of posting the notice: *Noseworthy v. Buckland*, L. R. 9 C. P. 233. See *Smith v. Huggett*, 11 C. B. N. S. 55, 31 L. J. 41. [Nor, under an act granting the right to contest elections to "electors," can a petition describing the petitioner as a "citizen and resident," be sustained on demurrer: *Blanck v. Pausch*, 113 Ill. 60.]

(*d*) *Cope v. Thames Haven, etc., Co.*, 3 Ex. 841; *Diggles v. London & Blackwall R. Co.*, 5 Ex. 442;

which authorize, and prescribe the manner and form of conveyances, by married women of their real estate,—as, by joinder of the husband, separate acknowledgment, and the like. The decisions of the courts are uniform that any substantial deviation from, or omission of, the required formalities, renders the instrument utterly void, not only as a conveyance, but also as an agreement to convey, thus giving the grantee named neither a legal nor an equitable title to the property,<sup>76</sup> and leaving the contract incapable of ratification without a new consideration,<sup>76</sup> and then only ratifiable by way of a new instrument properly executed in accordance with the statutory requirements.<sup>77</sup> And in general it may be said, that, where a statute at the same time gives a new power and prescribes the means and method of executing it, it can be lawfully executed in no other way.<sup>78</sup> Thus, a power given to a municipal corporation to establish fire limits and prohibit the erection of wooden buildings within the same, upon petition of owners of real estate, cannot be exercised except upon such antecedent petition;<sup>79</sup> and so of a power to grade on application of a majority of lot-holders on the

*Frend v. Dennet*, 4 C. B. N. S. 576. See, also, *Cornwall Mining Co. v. Bennett*, 5 H. & N. 432; *Irish Peat Co. v. Phillips*, 1 B. & S. 598, 30 L. J. 533. [See, also, *Second Manhattan B. A. v. Hayes*, 4 Abb. App. Dec. (N. Y.) 183; *Becket v. Build'g Ass'n*, 88 Pa. St. 211; *Workingmen's B. A. v. Coleman*, 89 Id. 428; *Gordon v. Build'g Ass'n*, 12 Bush (Ky.) 110; *Martin v. Build'g Ass'n*, 2 Cold. (Tenn.) 418.]

<sup>76</sup> See *Leggate v. Clark*, 111 Mass. 308; *Armstrong v. Ross*, 20 N. J. Eq. 109; *Watson v. Bailey*, 1 Binn. (Pa.) 470; *Trimmer v. Heagy*, 16 Pa. St. 484; *Stoops v. Blackford*, 27 Id. 213; *Glidden v. Strupler*, 52 Id. 400; *Dunham v. Wright*, 53 Id. 107; *Graham v. Long*, 65 Id. 283; *Miller v. Wentworth*, 82 Id. 280; *Innis v. Templeton*, 95 Id. 262; *Miller v. Ruble*, 107 Id. 395; *Montoursville Overseers v. Fairfield Overseers*, 112 Id. 99; *Bartlett v. Donoghue*, 72 Mo. 563; *Hoskinson v. Adkins*, 77 Id. 537; *Bagby v. Emerson*, 79 Id.

139; *Shumaker v. Johnson*, 35 Ind. 33; *Mattox v. Hightshue*, 39 Id. 95; *Beckman v. Stanley*, 8 Neb. 257; *Collum v. Pettigrew*, 10 Heisk. (Tenn.) 394. See, however, as to what is sufficient joinder of husband: *Thompson v. Lovrein*, 82 Pa. St. 432; *Pease v. Bridge*, 49 Conn. 58; *Mount v. Kesterson*, 6 Cold. (Tenn.) 432; *Evans v. Summerlein*, 19 Fla. 858.

<sup>77</sup> See *Brown v. Bennett*, 75 Pa. St. 420; *Kent v. Rand*, (N. H.) 22 Rep. 621.

<sup>78</sup> See *Buchanan v. Hazzard*, 95 Pa. St. 240; *Glidden v. Strupler*, 52 Id. 400.

<sup>79</sup> See *Head v. Ins. Co.*, 2 Cranch, 127; *Franklin Glass Co. v. White*, 14 Mass. 286; *Best v. Gholson*, 89 Ill. 465; *Journeay v. State*, 1 Mo. 428; *Sturgeon v. State*, 1 Blackf. (Ind.) 39; *State v. Cole*, 2 McCord (S. C.) 117; *Bish., Wr. L.*, § 256; and see *Cook v. Kelly*, 12 Abb. Pr. (N. Y.) 35, and ante, § 433.

<sup>80</sup> *Des Moines v. Gilchrist*, 67 Iowa, 210.

street."<sup>80</sup> Nor can a right to recover damages from a municipality for injuries caused to property by a change of grade from the original location of a street therein,—a right resting solely upon the statute which gives it,—be enforced in any way except that pointed out by the statute."<sup>81</sup>

§ 435. **Acts Relating to Judicial Procedure.**—[Where authority to proceed in courts of justice is conferred by statute, and where the manner of obtaining jurisdiction is prescribed by statute, the mode of proceeding is mandatory and must be strictly complied with, or the proceeding will be utterly void;<sup>82</sup> and] enactments regulating the procedure in courts seem usually to be imperative and not merely directory (*a*). If, for instance, an appeal from a decision be given, with provisions requiring the fulfillment of certain conditions, such as giving notice of appeal and entering into recognizances, or transmitting documents within a certain time, a strict compliance would be imperative, and non-compliance would be fatal to the appeal (*b*), [even where one of the defendants was confined in prison during the period allowed for perfecting the same.<sup>83</sup> So, a provision requiring the

<sup>80</sup> *Pittsburg v. Walter*, 69 Pa. St. 365. And see *S. P. Pensacola v. Wittich*, 21 Fla. 492.

<sup>81</sup> *Beltzhoover v. Gollings*, 101 Pa. St. 293; even independently of the act of 1806 (see ante, § 433 note): *Ibid*.

<sup>82</sup> *Norwegian Str.*, 81 Pa. St. 349, 354; *Seymour v. Judd*, 2 N. Y. 464.

(*a*) See, however, post, § 436, note, and § 445.

(*b*) *R. v. Oxfordshire*, 1 M. & S. 446; *R. v. Carnarvon*, 4 B. & A. 86; *R. v. Bond*, 6 A. & E. 905; *R. v. Lancashire*, 8 E. & B. 563; *Morgan v. Edwards*, 5 H. & N. 415; *Woodhouse v. Woods*, 29 L. J. M. C. 139; *Fox v. Wallis*, 2 C. P. D. 45. [See *Stafford v. Bank*, 16 How. 135; 17 Id. 275; *Stafford v. Canal and B'k'g Co.*, Id. 283; *Kirk v. Armstrong*, *Hemps*, 283; *Wilson v. Palmer*, 75 N. Y. 350; *Lane v. Wheeler*, 101 Id. 17; *Ill. W. R. R. Co. v. Gay*, 5 Ill. App., 393; *State v. Jones*, 11 Iowa, 11; *Pratt v. Stage Co.*, 26 Id. 241; *King v. McCann*, 35 Ala. 471;

*Mays v. King*, 28 Id. 690; *Coffman v. Davaney*, 2 Miss. 854; *Dawson's App.*, 15 Pa. St. 480; *Cherry Overseers v. Marion Overseers*, 96 Id. 528; *Road in Salem Tp.*, 103 Id. 250; *Providence Co. v. Chase*, 108 Id. 319; *Whipley v. Miins*, 9 Cal. 641; *Hildreth v. Gwindon*, 10 Id. 490; *Elliott v. Chapman*, 15 Id. 383; *Gordon v. Wansey*, 19 Id. 83; *Dooling v. Moore*, 20 Id. 14; *Mayer v. Prud'homme*, 1 La. An. 230; *Sears v. Willson*, 4 Id. 535; *Wood v. Wall*, 5 Id. 179; *Knight v. Bean*, 18 Me. 217; *Maxwell v. Wessels*, 7 Wis. 103; *Brown v. Ry. Co.*, 83 Mo. 478; *Harris v. Gest*, 4 Ohio St. 469; *McLaughlin v. State*, 66 Ind. 193; *Flory v. Wilson*, 83 Id. 391; *Clinton v. Phillips*, 7 T. B. Mon. (Ky.) 117; *Campbell v. Allison*, 63 N. C. 568; *Jeffery v. Marshall*, 1 Ark. 47; *Bayley v. Hazard*, 3 Yerg. (Tenn.) 487; *Lyall v. Guadalupe Co.*, 28 Tex. 57; *Zeckendorf v. Zeckendorf*, 1 Ariz. 401.]

<sup>83</sup> *Stone v. Eisman*, 1 Law T.,

party issuing an attachment, to give bond with a penalty, condition and sureties, was held imperative, and its observance indispensable in order to the validity of the process.<sup>64</sup>] The same imperative effect seems, in general, presumed to be intended, even where the observance of the formalities is not a condition exacted of the party seeking the benefit given by the Statute, but a duty imposed on a Court or public officer in the exercise of the power conferred on him; when no general inconvenience or injustice calls for a different construction. The 5 Eliz. c. 5 requiring that the writ de contumace capiendo shall be brought into the Queen's Bench, and be there opened in the presence of the judges, the omission of this apparently idle ceremony was deemed fatal to the validity of an arrest made in pursuance of the writ, though it had been enrolled in the Crown Office (*a*). An enactment which provided that every warrant issued by a Court should be under its seal, was equally imperative, and not only was a commitment under an unsealed warrant invalid, but the person who had obtained it without taking care that the Court performed its duty of sealing it, was liable in damage to the person arrested under it (*b*). This was hard on the former, but it was essential for the latter that the warrant should be duly authenticated. [Equally imperative are provisions requiring the person serving a summons to endorse thereon the date of service;<sup>65</sup> provisions relating to the time of levy,<sup>66</sup> or requiring sheriff's sales to be held at the court house.<sup>67</sup>] If commissioners, authorized to fix the

N. S. (Pa.) 123. But where the last day allowed is dies non, the next day is in time: *Rose's Est.*, 63 Cal. 346. And see ante, § 393.

<sup>64</sup> *Blake v. Sherman*, 12 Minn. 420. As to such powers and procedure and the strict construction and pursuance of acts giving them, ante, § 351.

(*a*) *Re Dale*, 7 App. 240, 50 L. J. Q. B. 234.

(*b*) *Exp. Van Sandau*, DeG. 303. So, a rate under the Pub. Health Act, 1848: *R. v. Workshop Board*, 5 B. & S. 95.

<sup>65</sup> *Wendel v. Durbin*, 26 Wis. 390.

<sup>66</sup> *People v. McCreery*, 34 Cal. 432.

<sup>67</sup> *Dryfus v. Bridges*, 45 Miss. 247. But statutes relating to the time and manner of summoning and bringing in jurors are said to be largely directory: *Johnson v. State*, 33 Miss. 363; *State v. Smith*, 67 Me. 328; *State v. Pitts*, 58 Mo. 556; *State v. Carney*, 20 Iowa, 82; *State v. Gillick*, 7 Id. 287; *Bish., Wr. L.*, § 255; and see *Colt v. Ives*, 12 Conn. 243; and so statutes providing for other steps in a judicial cause: *Bish., Wr. L.*, ubi supra; where the provisions, though in the nature of commands to an officer or court, do not confer rights on parties, in which case they are generally mandatory. *Ibid.*

boundaries of a parish, were required by the Act to advertise the boundaries which they fixed, and to insert them in their award, and the Act declared that the boundaries "so fixed" should be conclusive; a variation between the boundaries set forth in the award and those advertised would vitiate the award, as the requisites of the Act would not have been complied with (a). [So, where an act permitted the appointment of viewers by the court to lay out a road, upon petition designating the termini, a report of the viewers appointed upon such a petition showing an apparent departure from one of the termini designated therein, is not a compliance with the order or statute.<sup>88</sup>] The provision of the Union Assessment Act of 1862, regarding the deposit of the valuation list for inspection was held obviously imperative: for the omission would have left persons aggrieved by any alterations, without a timely opportunity for appealing (b).

§ 436. **Regulations, etc., of Acts Relating to Performance of Public Duties Directory.**—On the other hand, the prescriptions of a statute [often] relate to the performance of a public duty; and to affect with invalidity acts done in neglect of them would work serious general inconvenience or injustice to persons who have no control over those intrusted with the duty, without promoting the essential aims of the Legislature. [In such case, they are said not to be of the essence, of the substance of the thing required,<sup>89</sup> and, depending upon this quality of not being of the essence or substance of the thing required,<sup>90</sup> compliance being rather a matter of convenience, and the direction being given with a view simply to proper, orderly and prompt conduct of business,<sup>91</sup> they seem to be generally understood as mere instructions for the guidance and government of those on whom the duty is imposed, or, in other words,] as directory only. The

(a) *R. v. Washbrook*, 4 B. & C. 732; *R. v. Arkwright*, 12 Q. B. 960.

<sup>88</sup> *Boyer's Road*, 37 Pa. St. 257; *Seidel's Road*, 2 Woodw. (Pa.) 275.

(b) *R. v. Chorlton Union*, L. R. 8 Q. B. 5; *R. v. Ingall*, 2 Q. B. D.

199. [See *infra*, note 101.]

<sup>89</sup> *People v. Cook*, 14 Barb. (N. Y.) 290; 8 N. Y. 67; *Norwegian Str.*, 81 Pa. St. 349; *McKune v. Wells*, 11 Cal. 49; *Hurford v. Omaha*, 4 Neb. 336.

<sup>90</sup> See cases in preceding note.

<sup>91</sup> *Hurford v. Omaha*, *supra*.

neglect of them may be penal (*a*), but it does not affect the validity of the act done in disregard of them. It has often been held, for instance, when an Act ordered a thing to be done by a public body or public officers, and pointed out the specific time when it was to be done, that the Act was directory only, and might be complied with after the prescribed time (*b*). [Such is, indeed, the general rule, unless the time specified is of the essence of the thing,<sup>92</sup> or the statute shows that it was intended as a limitation of power, authority, or right.<sup>93</sup>] Thus, the 13 Hen. 4, c. 7, which required justices to try rioters "within a month" after the riot, was held not to limit the authority of the justices to that space of time, but only to render them liable to a penalty for neglect (*c*). [Acts which required an officer before whom statutory proceedings against an absconding, etc., debtor are taken, to make report;<sup>94</sup> a judge trying a cause without a jury to file his decision,<sup>95</sup> a referee his report,<sup>96</sup> or a public officer his official bond,<sup>97</sup> within a certain time, have severally been held directory. So, a direction to sell land for taxes at a certain time, there being nothing in the act from which to imply a prohibition against doing it at a later date;<sup>98</sup> a provision in a statute that the secretary of state should cause it to be published for three months;<sup>99</sup> and a requirement that notice of assessments on lot owners for grading, etc., should be given by publication for ten days in two daily papers, "that the parties may have an

(*a*) See *Ex. gr. Clarke v. Gant*, 8 Ex. 252, 22 L. J. 67; [*Rodebaugh v. Sanks*, 2 Watts (Pa.) 9, (as to solemnization of marriages of infants); post, § 440. See, also, *Torry v. Milbury*, 21 Pick. (Mass.) 67.]

(*b*) *Per* Littledale, J., in *Smith v. Jones*, 1 B. & Ad. 334.

<sup>92</sup> See, *e. g.*, *Webster v. French*, 12 Ill. 302, ante, § 431.

<sup>93</sup> See *Ibid.*; *People v. Allen*, 6 Wend. (N. Y.) 486; *Pond v. Negus*, 3 Mass. 230; *Walker v. Chapman*, 22 Ala. 116; *Hart v. Plum*, 14 Cal. 148; *State v. McLean*, 9 Wis. 292; *People v. Lake Co.*, 33 Id. 487; *Wilson v. State*

*B'k*, 3 La. An. 196; *St. Louis Co. v. Sparks*, 10 Mo. 117; *Ryan v. Vanlandingham*, 7 Ind. 416; and cases *infra*.

(*c*) *R. v. Ingram*, 2 Salk. 593.

<sup>94</sup> *Wood v. Chapin*, 13 N. Y. 509.

<sup>95</sup> *Stewart v. Slater*, 6 Duer (N. Y.) 83.

<sup>96</sup> *Re Empire City B'k*, 18 N. Y. 199.

<sup>97</sup> *McRoberts v. Winant*, 15 Abb. Pr. N. S. (N. Y.) 210.

<sup>98</sup> *Hugg v. Camden*, 39 N. J. L. 620.

<sup>99</sup> *State v. Click*, 2 Ala. 26; so that his failure to do so did not affect its operation: *Ib.*

opportunity of having mistakes or errors corrected.”<sup>100</sup>] To hold that an Act which required an officer to prepare and deliver to another officer a list of voters, on or before a certain day, under a penalty, made a list not delivered till a later day invalid, would, in effect, put it in the power of the person charged with the duty of preparing it, to disfranchise the electors; a conclusion too unreasonable for acceptance (a). [So, an act requiring an assessment roll to be returned within forty days;<sup>101</sup> and a provision that assessments made by appraisers appointed to appraise the value of paving, etc., done by a city, and to assess the same on the owners of lots abutting on the streets thus improved, shall be filed by the city solicitor in the prothonotary’s office within twenty days after it was made,<sup>102</sup> were held alike directory. And so, as to the time limited, was the requirement of a statute directing the secretary of state to advertise for sealed proposals for the state printing, which provided that the proposals be deposited in his office “on or before” a certain date;<sup>103</sup> and an act requiring the commissioners of a county to levy by a tax on the taxable property for the year 1866 an amount sufficient to pay certain bounties, to volunteers, whilst imperative as to the levy, was held directory as to time.<sup>104</sup> In a word, where a statute fixes a time within which public officers are

<sup>100</sup> *Pittsburg v. Coursin*, 74 Pa. St. 400; so that a failure to make such publication did not invalidate the assessment, and an owner might show mistakes and errors in the trial of a suit upon a claim under the same.

(a) *R. v. Rochester*, 7 E. & B. 910, 27 L. J. Q. B. 45, 434; *Hunt v. Hibbs*, 5 H. & N. 123, 29 L. J. Ex. 222; *Morgan v. Parry*, 17 C. B. 334, 25 L. J. 141; *Brumfit v. Bremner*, 9 C. B. N. S. 1, 30 L. J. 33; *R. v. Lofthouse*, L. R. 1 Q. B. 483, 35 L. J. 145; *R. v. Ingall*, 2 Q. B. D. 199.

<sup>101</sup> *Wheeler v. Chicago*, 24 Ill. 105. In *Smith v. Hard*, 59 Vt. 13, it was held that an act requiring listers to lodge in the town clerk’s office an abstract of the personal lists of all tax-payers, for their inspection, was mandatory; in consonance with the principle

laid down in *Willard v. Pike*, Id. 202, that statutory regulations which relate to the rights of tax-payers are conditions precedent to the legality of the tax, but those for the information of the lister, to promote method, are directory.

<sup>102</sup> *Magee v. Com’th*, 46 Pa. St. 358.

<sup>103</sup> *Free Press Ass’n v. Nichols*, 45 Vt. 7 (comp. *Webster v. French*, 12 Ill. 302, ante, § 431); though the direction to advertise was imperative: *Ibid*.

<sup>104</sup> *State v. Harris*, 17 Ohio St. 608. “The intention of the Legislature was to invest the volunteers, in the counties to which the act applies, with the right to the bounty; and it was not intended to make the right dependent on the mere choice or pleasure of the commissioners:” *Ib.*, p. 615.



to perform some act touching the rights of others, and there is no substantial reason apparent from the statute itself, from other statutes, or from the consequences of delay—*e. g.*, a wrong to the intervening rights of third parties<sup>105</sup>—why the act might not be as well done after the expiration of the period limited as during the same, or indicating that the Legislature intended it should not be done at all if not within that period, the latter will, as regards third persons, be treated as directory, and the fixing of it will not invalidate or prevent official acts, under the statute, after the expiration of the prescribed period.<sup>106</sup>

§ 437. **Matters of Procedure by Public Officers.**—[In general, statutes directing the mode of proceeding by public officers are deemed advisory, and strict compliance with their detailed provisions is not indispensable to the validity of the proceedings themselves, unless a contrary intention can be clearly gathered from the statute construed in the light of other rules of interpretation.<sup>107</sup> Thus, an act requiring that the minutes be signed by the judges of the superior and inferior courts;<sup>108</sup> that the lists of voters shall be signed by the officers who prepared them;<sup>109</sup> that a surrogate shall take from the person to whom he grants letters of administration a bond with two or more sureties;<sup>110</sup> that a clergyman marrying a minor shall require a certificate of his or her parent's or guardian's consent,<sup>111</sup> and that all marriages shall be solemnized by the contracting parties taking each other for husband and wife before twelve sufficient witnesses, that a certificate of marriage be

<sup>105</sup> *Bell v. Taylor*, 37 La. An. 56.

<sup>106</sup> *State v. McLean*, 9 Wis., 292; *Limestone Co. v. Rather*, 48 Ala. 433; *Bell v. Taylor*, *supra*.

<sup>107</sup> See *Bish., Wr. L.*, § 255; *Potter's Dwaris*, p. 222, etc., note 29; *Holland v. Osgood*, 8 Vt. 280; *Jones v. State*, 1 Kan. 273; and cases *infra*.

<sup>108</sup> *Justices v. House*, 20 Ga. 328. They are valid, if not signed, until shown to have been rejected by the court; nor need they state the place where the court sat:

*Ibid.* But an act requiring the commissions of officers to be signed by certain persons is mandatory: *People v. Willard*, 51 Hun (N. Y.) 530. See *People v. Murray*, 70 N. Y. 521; comp. *People v. Fitzsimmons*, 68 Id. 514.

<sup>109</sup> *Morgan v. Parry*, 17 C. B. 334.

<sup>110</sup> *Bloom v. Burdich*, 1 Hill, (N. Y.) 130.

<sup>111</sup> *Rodebaugh v. Sanks*, 2 Watts (Pa.) 9. Consent given by the parent or guardian personally present is sufficient: *Ib.*

registered, etc.,<sup>112</sup> have all been held to be merely directory. Such also was the construction of a provision in a city charter requiring the oath of office to be administered by the mayor to all persons appointed to office under the municipal government,<sup>113</sup> and the provision in an act authorizing a town to issue bonds, to be signed by the chairman of the town board of supervisors and the town clerk, that they should have annexed to them a certain certificate by the clerk of the county board and supervisors as to the official character of the persons subscribing and the genuineness of their signatures.<sup>114</sup> So, where an act empowered the government of a city to divide the same into sewerage districts, to devise plans for the sewerage of such districts, and directed that copies of the complete plans should be made and filed in certain municipal offices, and that, upon completion of the plan of sewerage of any district and filing of copies thereof, contracts might be made, it was held that clearly the latter provision indicated that the making of contracts should not be postponed to the filing of the complete plans, and that the filing of the plan of sewerage for a certain district was not a prerequisite to the validity of contracts and assessments for the construction of such district sewer.<sup>115</sup>] The Poor Law Amendment Act of 1834, in providing that the Commissioners should direct the elections of one or more guardians for each parish included in the Union, did not make the constitution of the Board of Guardians invalid because one parish refused to elect a guardian (a). The enactment in the Ecclesiastical Dilapidations Act of 1871, which provides that within three months of the avoidance of a benefice, the bishop shall direct the surveyor to report the sum required to make good the dilapidations, is directory only as to the time; for it was a duty, not a power, which the Statute imposed on the bishop; and his neglect would otherwise have defeated the object of the Statute by

<sup>112</sup> Ibid.<sup>113</sup> *Caniff v. New York*, 4 E. D. Smith (N. Y.) 480.<sup>114</sup> *Lackawanna, etc., Co. v. Little Wolf*, 88 Wis. 152.<sup>115</sup> *Matter of New York Prot. Episc. Publ. School*, 47 N. Y. 556. (a) *R. v. Todmorden*, 1 Q. B. 185.

rendering the estate of the late incumbent exempt from liability for his dilapidations (*a*). The 5 Geo. 4, c. 84, having enacted that when any convict adjudged to transportation by any British Court out of the United Kingdom was brought to England to be transported, it should be lawful to imprison him in any place of confinement provided under the Act, it was held that if the place in which a prisoner was confined was not one of the appointed places, the officers concerned might be liable to censure, but the detention was not unlawful so as to entitle the prisoner to be discharged (*b*). [And though a statute required a bond to secure the rent of a public bridge, a promissory note given instead thereof was held valid;<sup>116</sup> nor was non-compliance with a statutory requirement of specific designation of the time of commencement of a statute held to preclude its immediate operation where such an intent was apparent;<sup>117</sup> or a deed by a public officer requiring two witnesses to be ineffectual when attested by only one.<sup>118</sup>

§ 438. **Effect of Public Inconvenience and Private Injury.**—[On the ground of intolerable public inconvenience, which it would be unreasonable to suppose the Legislature to have intended,] the acts of aldermen who had been in office for several years without re-election, were held valid until their successors were appointed; the provision that they should be elected annually being regarded as directory only (*c*). [Similarly are treated the provisions of public election laws when necessary to reach a correct result,<sup>119</sup> or sustain the election—as, *e. g.*, provisions concerning the manner in which the ballot boxes shall be secured after the canvass is completed,<sup>120</sup> or the time during which the polls are to be kept

(*a*) *Per* Denman, J., in *Caldow v. Pixell*, 2 C. P. D. 562; *Gleaves v. Marriner*, 1 Ex D. 107.

(*b*) *Brenan's Case*, 10 Q. B. 492.  
<sup>116</sup> *Central B'k v. Kendrick*, *Dudley (Ga.)* 66.

<sup>117</sup> *Baker v. Compton*, 52 Tex. 252.

<sup>118</sup> *Comm'rs of U. S. Dep. Fund v. Chase*, 6 Barb. (N. Y.) 37.

(*c*) *Foot v. Truro*, 1 Stra. 626. See, also, *Lorant v. Scadding*, 13 Q. B. 687, 19 L. J. M. C. 5, and

*Aldgate v. Slight*, 2 L. M. & P. 662. See *R. v. Corfe Mullen*, 1 B. & Ad. 211. [See, for another instance of this kind, ante, § 432, *Margate Pier Co. v. Hannam*, 3 B. & A. 266.]

<sup>119</sup> *Duncan v. Shenk*, 109 Ind. 26; but comp. *Taylor v. Taylor*, 10 Minn. 107.

<sup>120</sup> *People v. Livingston*, 79 N. Y. 279. See, also, as to arrangement of ballot boxes: *Weil v. Calhoun*, 25 Fed. Rep. 865.

open,"<sup>121</sup> or at which they shall be closed"<sup>122</sup>—and even the requirement of annual elections of corporate officers"<sup>123</sup> and the provisions of a corporate charter and by-laws as to the form of acceptance of official bonds by the directors."<sup>124</sup> And] it has been held that the neglect of merely formal requisites in keeping the register of the shareholders of a joint stock company, however fatal for some purposes, is immaterial as between the company and its shareholders. Thus, the provision that the register should be sealed, though essential to its being producible in evidence, is immaterial as regards making a person a shareholder, if there be in fact a book bona fide intended to be a register. But the neglect to number and appropriate the shares would be fatal (*a*). And the provisions in the Companies Act of 1862, directing that a register shall be kept of all mortgages and charges on the property of the company, to be open to the inspection of creditors, and imposing penalties on any of the company's officers who contravene them, are directory, so that they do not affect the validity of unregistered mortgages (*b*). [So, the rule, whether established by statute, charter or by-laws, that the stock of a corporation shall be transferable only upon its books, is treated as directory in so far that it does not prevent the title to shares from passing by a transfer made otherwise.<sup>125</sup> "But as the stock-book is the evidence of the relation between the member and the association, the certificate being such only secondarily, and as the corpora-

<sup>121</sup> Fry v. Booth, 19 Ohio St. 25; so that the closing of the polls for one hour for dinner will not vitiate the election, although the law contemplates the keeping open of the polls continuously between the prescribed hours of opening and closing.

<sup>122</sup> Swepton v. Barton, 39 Ark. 549.

<sup>123</sup> See Bish., Wr. L., § 255; Angell & Ames, Corp., §§ 142-144, 771; Hoboken B. A. v. Martin, 18 N. J. Eq. 428. Directions to non-official persons may be directory equally as those to officials: Bish., Wr. L., § 255.

<sup>124</sup> Bank of U. S. v. Dandridge, 12 Wheat. 64. And see Whitney v. Emmett, Baldw. 803; Angell &

Ames, Corp., §§ 254, 284, 319.

(*a*) *Per cur.* in Henderson v. Royal British Bank, 7 E. & B. 356, 26 L. J. 112; Wolverhampton Water-works Co. v. Hawkesford, 11 C. B. N. S. 456, 29 L. J. 121, 31 Id. 184; Southampton Dock Co. v. Richards, 1 M. & Gr. 448; London Grand Junction R. Co. v. Freeman, 2 Id. 606.

(*b*) *Re* Marine Mansions Co., L. R. 4 Eq. 601; comp. *Re* Patent Bread Co., L. R. 7 Ch. 289; *Re* Wynn Hall Co., 10 Eq. 515; Smith's Case, 579. See another illustration in Bosanquet v. Woodford, 5 Q. B. 310.

<sup>125</sup> Duke v. Nav. Co., 10 Ala. 82. See Angell & Ames, Corp., § 354. Endl., Build'g Ass'ns, § 446.

tion itself, when performing a corporate duty, springing out of the membership relation, and not dealing with its stockholder on the security of his stock in a distinct contract relation, need consult nothing further than its own records, whoever would demand the privileges of a stockholder being bound to produce his title, and ask to be permitted to participate; it is evident that an assignment of the stock not entered upon the books, though it passes a perfect title as between the parties to the assignment, is only an equitable transfer, and, to be made absolutely available, and give the transferee the privileges of a recognized stockholder, must be produced to the corporation, and a transfer effected, or, at least, demanded."<sup>126</sup> Consequently, where a member of a building association, who had assigned his stock therein, and delivered the certificate to a bank as collateral security, with power of attorney to transfer, no transfer, however, being made on the books of the association, borrowed money from the latter upon his shares, and upon the corporate books, transferred them to the association, and upon the expiration of the association, its officers distributed its assets amongst the stockholders shown by the books, including the association, without notice from the bank or to the bank, it was held that they were not liable to the latter on the certificates held by it.<sup>127</sup>

§ 439. Where an Act provided that no beer license should be granted to any person who was not a resident occupier of the premises sought to be licensed, under the penalty of the license being null and void; and it required, further, that the applicant should produce to the licensing officer a certificate from the overseer of the parish, that he was such resident occupier; the latter provision was considered to be only directory, and a license obtained without the certificate, good. The omission, from the later passage, of the nullifying words which were appended to the former, were some

<sup>126</sup> Ibid., cit. Bank of Commerce's App., 73 Pa. St. 59; Dobinson v. Hawks, 16 Sim. 407; 12 L. T. Rep. 238; 39 Engl. Ch. Rep. 406; German Union B. & S. Ass'n v. Sendmayer, 50 Pa. St. 67; Field, Corp., § 132, note 3.

<sup>127</sup> B'k of Commerce's App., supra. There was no provision in the association's charter requiring transfer upon the books. A fortiori, this rule would hold where there was such a requirement.

indication of a difference of intention; besides, though it was reasonable that a license to a person not properly qualified should be void, it would hardly be reasonable that it should be void, if the holder was duly qualified, merely because the licensing officer had not been satisfied of the qualification by the particular means provided by the Act; which might have been wrongfully withheld by the overseer (*a*). The Public Health Act of 1848, in empowering the Local Board of Health to enter into all contracts necessary for carrying the Act into execution, contains two provisions which may be taken as illustrating the distinction under consideration. It enacts that contracts exceeding ten pounds in value shall be sealed with the seal of the board; that they shall contain certain particulars; and that "every contract so entered into shall be binding; provided always . . . that before contracting for the execution of any works, the board shall obtain from the surveyor a written estimate of the probable expense of executing it and keeping it in repair." The first of these requisites was decided to be imperative, and a contract unsealed was consequently held inoperative against the board and the rates. The power to contract so as to bind the rates could not have been exercised if it had not been given by the Act; and, being entirely the creature of the statute, it could not be exercised in any other manner than that prescribed by the statute (*b*). But the provision which required an estimate was held to be merely a direction or instruction for the guidance of the board, and not a condition precedent, the performance of which was essential to the validity of the contract (*c*). It was remarked, that in the former case, the party contracted with knew, or had the means of knowing, what forms were required by the Act, and could see to their observance; while in the latter, he had not,

(*a*) *Thompson v. Harvey*, 4 H. & N. 254, 28 L. J. M. C. 163.

(*b*) 11 & 12 Vict. c. 63, s. 85, repealed and re-enacted in substance by 38 & 39 Vict. c. 55, ss. 173, 174; *Frend v. Dennet*, 4 C. B. N. S. 576; 27 L. J. 314; *Hunt v. Wimbledon Loc. Bd.*, 4 C. P. D. 49, 48 L. J. 207; *Ashbury v. Richie*, L. R. 7 H. L. 653; *Eaton*

*v. Basker*, 7 Q. B. D. 529, 50 L. J. 444; *Young v. Leamington*, 8 Q. B. D. 579, 51 L. J. 292; *R. v. Norwich*, 80 W. R. 752, Q. B. May, 1882. *Comp. Cole v. Green*, 6 M. & Gr. 682.

(*c*) *Nowell v. Mayor, etc., of Worcester*, 9 Ex. 467, 23 L. J. 139; *Bonar v. Mitchell*, 5 Ex. 415.

it was said, the same facility for ascertaining whether the board had consulted their surveyor. The non-observance of the latter provision would, however, probably impose on the board the penalty of having no remedy against their constituents for re-imbursement (*a*).

§ 440. **Remedy for Omission of Directory Duty.**—It is no impediment to the construction [of a provision as being directory], that there is no remedy for non-compliance with the direction. The Act of 2 Hen. 5, which requires justices to hold their sessions in the first week after Michaelmas, Epiphany, Easter, and the translation of St. Thomas the Martyr, has always been held to be merely directory (*b*). So, the 6 Rich. 2, c. 5, which requires the justices to hold their sessions in the principal towns of their county, was held to be directory, not coercive (*c*). And yet it would be difficult to say that there would be any remedy against justices, for appointing their sessions on other days or places than those prescribed by the Statute (*d*). [Nor conversely, does the fact that a provision is regarded as directory only exonerate the person charged with its observance and guilty of its disregard from punishment,<sup>128</sup> or from liability to a party injured by his short-coming.<sup>129</sup>]

§ 441. **Impossibilities in the Nature of Things.**—Enactments which impose duties on conditions are, when these are not conditions precedent to the exercise of a jurisdiction, subject to the maxim that *lex non cogit* and *impossibilia aut inutilia*. They are understood as dispensing with the performance of what is prescribed, when performance is impossible (*e*); for the law, in its most positive and

(*a*) *Per Parke, B., Id.* See *East Anglian R. Co. v. E. C. R. Co.*, 11 C. B. 775, 21 L. J. 23; *McGregor v. Deal*, etc., R. Co., 18 Q. B. 618, 22 L. J. 69; *Royal British Bank v. Turquand*, 5 E. & B. 248; *Nugent v. Smith*, 1 C. P. D. 423.

(*b*) 2 Hale, P. C. 50.

(*c*) 2 Hale, P. C. 39.

(*d*) *Per Parke, B., in Gwynne v. Burnell*, 2 Bing. N. C. 39.

<sup>128</sup> See, ante, § 436.

<sup>129</sup> *Brown v. Lester*, 21 Miss. 392.

(*e*) As to performance, where the duty has not been imposed by superior authority, but has been voluntarily assumed, see *Paradine v. Jane*, 27, Aleyn, and the cases cited in *Hall v. Wright*, E. B. & E. 746. See, also, *Taylor v. Caldwell*, 3 B. & S. 826; *Boast v. Firth*, L. R. 4 C. P. 1; *Appleby v. Myers*, L. R. 1 C. P. 615, 2 C. P. 651; *Clifford v. Watts*, L. R. 5 C. P. 577; *Howell v. Coupland*, L. R. 9 Q. B. 462; and *Nichols v. Marsland*, 2 Ex. D. 4.

peremptory injunctions, is understood to disclaim, as it does in its general aphorisms, all intention of compelling impossibilities, and this general exception is a general rule of statutory construction.<sup>180</sup> Thus, where an Act provided that an appellant should send notice to the respondent of his having entered into a recognizance, in default of which the appeal should not be allowed, it was held that the death of the respondent before service was not fatal to the appeal, but dispensed with the service (*a*). In the same way, the provision of the 20 & 21 Vict. c. 43, which similarly makes the transmission of a case stated by justices to the superior courts, by the appellant, within three days from receiving it, a condition precedent to the hearing of the appeal (*b*), was held dispensed with, when the Court was closed during the three days; since compliance was impossible (*c*). [And so, of course, an act requiring, under penalties, the measure-

<sup>180</sup> *Boody v. Watson*, (N. H.) 4 New Engl. Rep. 553, 569, cit. *The Generous*, 2 Dods 322, 323; *Hall v. Sullivan R. R.*, 21 Mon. Law Rep. O. S. 138, 147. See, also, *Bish., Wr. L.*, § 41. On the principle *lex non cogit ad vana seu inutilia*, it was held, in *Huntington v. Nicoll*, 3 Johns. (N. Y.) 566, 598, that an order that had long since expired need not be reversed though erroneous. And invoking the principles that *lex non intendit aliquid impossibile—nil facit frustra—nil jubet frustra*, and that it is the duty of the court to construe a statute, if possible, *ut res magis valeat quam pereat* (cit. *Huber v. Reilly*, 53 Pa. St. 112, 115, 117; and see ante, §§ 265, 178-181), the Supreme Court of Pennsylvania, in the *Election Cases*, 65 Pa. St. 20, 30-31, a statutory provision requiring the complaint in a contested election case to be verified by affidavit that the "facts set forth in such complaint are true," was satisfied by an affidavit by complainants that they were true "to the best of their knowledge and belief." And in *Moffatt v. Montgomery*, 68 Mo. 162, it was held, that, where the objection, in an election contest, was not to the voters, but to the action of the election officers in

counting *blanks* as votes, the requirement of the statute that the notice of contest shall state the names of the voters objected to, was inapplicable. See, also, *State v. Piper*, 17 Neb. 614, as to effect of statute limiting time for holding an election to a less number of days than required for registration of voters, so that no registration was had.

(*a*) *R. v. Leicestershire*, 15 Q. B. 88. See, also, *Brumfitt v. Roberts*, L. R. 5 C. P. 224. [Compare, however, *Clark v. Snyder*, 40 Hun (N. Y.) 330, post, § 443, and *R. v. Pickford*, ante, § 10.

(*b*) *Morgan v. Edwards*, 5 H. & N. 415, 29 L. J. M. C. 108; *Woodhouse v. Woods*, Id. 149; *Stone v. Dean*, E. B. & E. 504; 27 L. J. Q. B. 319; *Norris v. Carrington*, 16 C. B. N. S. 10; *Exp. Harrison*, 2 DeG. & J. 229; *Exp. Hull Bank*, 27 L. J. Bank. 16 S. Q.

(*c*) *Mayer v. Harding*, L. R. 2 Q. B. 410; see *R. v. Allen*, 4 B. & S. 915, 33 L. J. M. C. 98. [Where, through the destruction of the papers belonging to a case, by the burning of the court house, it became impossible to present a transcript as required for review in the Supreme Court, the case was remanded for a new trial: *Miller v. Shotwell*, 38 La. An. 103.]



ment of wood offered for sale to be made by sworn surveyors of the town when such have been appointed, leaves the parties free to ascertain the quantity by any measurer appointed for that purpose by themselves, where no legal surveyors of wood have been appointed.<sup>181</sup>]

§ 442. **Impossibilities Arising from Acts of Parties.**—In such cases, the provision or condition is dispensed with, when compliance is impossible in the nature of things. It would seem to be sometimes equally so, where compliance was, though not impossible in this sense, yet impracticable, without any default on the part of the person on whom the duty was thrown. An Act, for instance, which made actual payment of the rent, as well as the renting of a tenement, essential to the acquisition of a settlement, would probably be complied with, if the rent was tendered, though it was not accepted (*a*). If the respondent in an appeal kept out of the way to avoid service of the notice of appeal, or at all events could not be found after due diligence in searching for him, the service required by the statute would probably be dispensed with (*b*). [So, under an act requiring a citation of appeal be served upon the opposite party personally, if resident in the state, a service upon counsel was held sufficient where the appellee caused herself to be sequestered and could not be found;<sup>182</sup> and so was, under a statute, a notice of appeal filed in the clerks office where the appellee had failed to designate a person to receive notices in the case.<sup>183</sup>] So, if the appellant was entitled to appeal, subject to the condition of giving security for costs within a certain time, he would be held to have complied with the condition, if he offered and was ready to

<sup>181</sup> *Coombs v. Emery*, 14 Me. 404. And see *Abbott v. Goodwin*, 37 Id. 203. The provision of a statute requiring ninety days' notice of expiration of time for redemption before issuing a deed for land sold for taxes, to the person in whose name the land was taxed and to the person in possession, was held dispensed with where the owner was unknown and no one in possession: *Burdick v. Connell*,

69 Iowa 458; *Tuttle v. Griffin*, 64 Id. 455.

(*a*) *Per* Bayley, J., in *R. v. Amphill*, 2 B. & C. 847.

(*b*) *Per cur.* in *Morgan v. Edwards*, and *per* Crompton, J., and Hill, J., in *Woodhouse v. Woods*, ubi sup. See, also, *Syed v. Carruthers*, E. B. & E. 469.

<sup>182</sup> *Marshall v. Watrigant*, 13 La. An. 619.

<sup>183</sup> *Brantley v. Jordan*, 90 N. C. 25.

complete the security within the limited time, though it was, owing to the act of the court, [or of the clerk thereof,<sup>124</sup>] or of the respondent, not completed till long after (a).

§ 443. **Impossibilities upon which Jurisdiction is Conditioned.**—Where, however, the act or thing required by the statute is a condition precedent to the jurisdiction of the tribunal, compliance cannot be dispensed with ; and if it be impossible, the jurisdiction fails. It would not be competent to a Court to dispense with what the Legislature had made the indispensable foundation of its jurisdiction. Thus, the Act which enacts that justices, at the hearing of a bastardy summons, “shall hear the evidence” of the mother, and such other evidence as she may adduce ; and which authorizes them to make an affiliation order “if the mother’s evidence be corroborated in some material particular by other testimony,” makes the evidence of the mother so essential to the jurisdiction, that no order could be made without it, although the woman died before the hearing (b). So, under the County Courts Act, 1875, which empowers a party to move the appellate Court or a judge at chambers for a new trial “within eight days after the decision,” the time could not be extended by either Court or judge (c). Under the 13th section of the Admiralty Act of 1861, which gives the Court of Admiralty the same powers, when a vessel or its proceeds are under arrest, as the Court of Chancery has under the Merchant Shipping Act of 1854, over suits for limiting the liability of ship-owners, no jurisdiction could be exercised by the former Court, when the ship was lost. The jurisdiction of the Court depended on the ship, or the proceeds of its sale, being under arrest ; and the ship-owner could not give it jurisdiction by paying into Court a sum equivalent to its value or proceeds (d). [In general, wherever the Legislature, declares that an act shall not be performed except on a con-

<sup>124</sup> See *Lewis v. Hennen*, 13 La. An. 259 ; *Barton v. Kavanaugh*, 12 Id. 332.

(a) *Waterton v. Baker*, L. R. 3 Q. B. 173 ; and see *R. v. Aston*, 1 L. M. & P. 491.

(b) *R. v. Armytage*, L. R. 7 Q. B. 773.

(c) 38 & 39 Vict. c. 50 ; *Brown v. Shaw*, 1 Ex. D. 425 ; *Tennant v. Rawlings*, 4 C. P. D. 133. [*S. P.*, *Seymour v. Judd*, 2 N. Y. 464.]

(d) *James v. S. W. R. Co.*, L. R. 7 Ex. 287. See, also, *R. v. Belton*, 11 Q. B. 379.

dition precedent, and it is impossible to perform the condition the latter does not fall, but the prohibition is absolute.<sup>185</sup> And so, where a right or jurisdiction is given based upon certain conditions, if they are or become impossible of performance, the right or jurisdiction cannot be exercised. Thus, under an act giving a plaintiff in suits upon certain causes of action the right to demand judgment against the defendant after the lapse of a certain number of days, if he failed to file an affidavit of defence, the plaintiff being required, within two weeks after the return of the original process, and before the judgment day, to file a copy of his cause of action in the suit,—which requirement was regarded as a condition precedent to his right to ask for such judgment against defendant, and to the latter's duty to file an affidavit<sup>186</sup>—it was held, that, where the plaintiff was, in fact, dead at the time of the impetration of the writ, and the latter was not amended until after the judgment day, no judgment could be taken for want of an affidavit of defence, there being no one who could perform, within the prescribed time, that which was imposed upon a plaintiff as a condition precedent to his right to take such judgment.<sup>187</sup> Upon this ground also, probably rests the decision, under a statute requiring notice of appeal to be served on the appellee, but designating no person upon whom such notice might be served after the appellee's death and before the appointment of an administrator, that service upon the widow, the justice from whose judgment the appeal was taken, the county clerk and the attorney who appeared before the justice, was not legal service, the administrator being clearly the only person upon whom such notice could be served, and the service of it being a condition precedent to the jurisdiction of the court.<sup>188</sup> It follows also, that, where a statute designed to attain a particular object, prescribes no method of procedure for the purpose, and there is no court whose forms of pro-

<sup>185</sup> *State v. Douglass*, 5 Sneed (Tenn.) 608.

<sup>186</sup> *Thomas v. Shoemaker*, 6 Watts & S. (Pa.) 179; *Gottman v. Shoemaker*, 86 Pa. St. 31.

<sup>187</sup> *Lynch v. Kerns*, 10 Phila.

(Pa.) 335. *Comp. Smith v. Hiester*, 11 W. N. C. (Pa.) 353.

<sup>188</sup> *Clark v. Snyder*, 40 Hun (N. Y.) 330, *Hardin, J.*, dissenting, because the time was too short to raise an administrator. *Comp.*, ante, § 441.

cedure can supply the deficiency, the statute must remain a nullity.<sup>139</sup> But a statute which prescribes the punishment of an offence by fine and imprisonment either in the penitentiary or the state prison, in the discretion of the court, is not void because, in many counties of the state there may be no penitentiaries.<sup>140</sup>]

§ 444. **Waiver of Statutory Provisions as to Rights of Contracts.**—Another maxim which sanctions the non-observance of a statutory provision, is that, *cuiuslibet licet renuntiare juri pro se introducto*. Every one has a right to waive, and to agree to waive the advantage of a law or rule made solely for the benefit and protection of the individual, in his private capacity (*a*), and which may be dispensed with without infringing on any public right or public policy.<sup>141</sup> Thus a person may agree to waive the benefit of the Statute of Limitations (*b*). The trustees of a turnpike road may, in demising the tolls, waive the provision of the Act which requires that the demise shall be signed by the sureties of the lessee (*c*). A passenger may waive the benefit of an enactment which entitles him to carry so many pounds of luggage with him; and he does so, it may be added, by taking a ticket with the express condition that he shall carry no luggage (*d*). The only person intended to be benefited by such an enactment is, obviously, the passenger himself; and no consideration of public policy is involved in it (*e*).

<sup>139</sup> Hughes' Case, 1 Bland (Md.) 46.

<sup>140</sup> People v. Borges, 6 Abb. Pr. (N. Y.) 132; though in such counties, it was added, the statute might possibly be inoperative, the prisoner being entitled to the benefit of all the various grades of punishment the act mentions,—a consideration which would probably induce the court, at all events, to suspend judgment or greatly to reduce the term of imprisonment: *Ibid*.

(*n*) McAlister v. Rochester (Bp.), 5 C. P. D. 194, 49 L. J. 114. [Great East. Ry. Co. v. Goldsmid, L. R. 9 App. Cas. 927; Schuylkill, etc., Co. v. Decker, 2 Watts (Pa.) 343, 345; Tombs v. R. R. Co., 18 Barb. (N. Y.) 593.]

<sup>141</sup> The Cal. Civ. Code, 8518, 8268, Ga. Code, 1882, 10, La. Rev. Civ. Code, 11, and Dak. Civ. Code, 2066, declare that laws made for the preservation of public order or good morals cannot be abrogated by agreement; but a person may waive or renounce what the law has established in his favor, when he does not thereby injure others or affect the public interest: from Stimson, Amer. Stat. L.

(*b*) E. I. Co. v. Paul, 7 Moo. P. C. 86; Lade v. Trill, 6 Jur. 272, per Knight Bruce, V. C.

(*c*) Markham v. Stanford, 14 C. B. N. S. 376.

(*d*) Rumsey v. N. E. R. Co., 14 C. B. N. S. 641; 32 L. J. 244.

(*e*) *Id.* per Willes, J.

A company authorized by statute to levy tolls within a specified maximum is not bound to exact uniform tolls from all persons alike; but is entitled, in the absence of an express provision requiring equality, to remit any part of the tolls to particular persons, at its discretion (a). [An adjacent land-owner may waive his rights under an act requiring railroad companies to fence.<sup>142</sup> A company invested with the privilege of appropriating lands may waive the right given by its charter to apply to the court for writs of inquiry *ad quod damnum*, designed for the benefit of the company, as a measure of precaution to ascertain in advance the damages to be incurred in the adverse taking.<sup>143</sup> The legal owner of real estate, out of possession at the time when the equitable owner in possession caused a building to be erected thereon without the former's consent, may waive the benefit of an act providing that mechanics' liens shall not extend to any other or greater estate in the land than that of the person or persons in possession at the date of the commencement of the building and directing the performance of the work, etc., and that no greater estate than this shall be sold by virtue of any execution authorized by the act.<sup>144</sup> A party may waive the right declared by statute of assignees of life, fire, etc., insurance policies to sue in their own names; and hence such an act has no application where the policy expressly provides that it shall not be assigned or transferred without the consent of the insurance company, and such assent has not been given.<sup>145</sup> A married woman may, by a written agreement, made between her and her husband, to separate, each for a valuable consideration, relinquishing whatever

(a) *Hungerford Market Co. v. City Steam Boat Co.*, 3 E. & E. 365, 30 L. J. 25.

<sup>142</sup> *Tombs v. R. R. Co.*, 18 Barb. (N. Y.) 533.

<sup>143</sup> *Schuylkill, etc., Co. v. Decker*, 2 Watts (Pa.) 343.

<sup>144</sup> *Weaver v. Lutz*, 102 Pa. St. 593: and one, who, without objection, permits a judgment to be improperly obtained against him on a *sci. fa.* upon such a mechanic's claim, permits the judgment to

stand unchallenged and a sheriff's sale of his interest in the land to be made under an execution on the judgment, will be presumed to have waived the provision of such an act, and will not be allowed, in an action of ejectment, to set up the invalidity of the judgment as against a bona fide purchaser at the sheriff's sale, who relied upon the verity of the record: *Ibid.*

<sup>145</sup> *Nat. Mut. Aid Soc'y v. Lupold*, 101 Pa. St. 111.

marital rights either might have in the estate of the other, followed by actual separation, waive her statutory right to the \$300 exemption out of his estate upon his decease.<sup>146</sup> A party may waive the benefit of exemption laws,<sup>147</sup> or that of a provision, in an act giving a mortgagee a remedy by scire facias upon the mortgage, which postpones his right to issue the writ until after the expiration of twelve months next ensuing the last day whereon the mortgage-money ought to have been paid, or other condition performed.<sup>148</sup> Indeed, even where a contract is prohibited by statute, the principle that courts will not enforce contracts made in the face of such prohibition or permit the recovery of money paid in pursuance of them, is inapplicable where the prohibition was intended for the mere protection of one of the parties against a supposed undue advantage possessed by the other.<sup>149</sup>

§ 445. **Waiver, etc., as to Procedure and Practice in Courts.**—The regulations concerning the procedure and practice of Civil Courts may in the same way, when not going to the jurisdiction,<sup>150</sup> be waived by those for whose protection they were intended. Thus, the provisions of the Act of 4 Anne, c. 16, which required that a plea in abatement should be verified by affidavit, might be waived by the plaintiff (*a*). [The statutory limitation as to the time within which a defendant is allowed to file his affidavit of defence, and at

<sup>146</sup> Speidel's App., 107 Pa. St. 18.

<sup>147</sup> McKinney v. Reader, 6 Watts (Pa.) 34; Case v. Dunmore, 23 Pa. St. 94. But see Firmstone v. Mack, 49 Id. 387, post, § 447.

<sup>148</sup> Huling v. Drexell, 7 Watts (Pa.) 126.

<sup>149</sup> Scotten v. State, 54 Ind. 52. See, also, Deming v. State, 23 Id. 416. See, also, Dupre v. McCright, 9 La. An. 146. A provision that may be waived by the party for whose protection it is intended, cannot be invoked by anyone else to invalidate the contract: Bennet v. Mattingly, 110 Ind. 197; Beecher v. Rolling Mill Co., 45 Mich. 103, where it is said: "Courts often speak of acts and contracts as void

when they mean no more than that some party has a right to avoid them . . . Legislators sometimes use language with equal want of exact accuracy; and when they say that some act or contract shall not be of any force or effect, mean perhaps no more than this, that at the option of those for whose benefit the provision was made, it shall be voidable and have no force or effect as against their interests,"—cit.: Green v. Kemp, 13 Mass. 515; Terrill v. Auchaner, 14 Ohio St. 80; State v. Richmond, 26 N. H. 232.

<sup>150</sup> See Weidenhamer v. Bertie, 103 Pa. St. 448.

(*a*) Graham v. Ingleby, 1 Ex. 651.

the expiration of which, in default of such affidavit, the plaintiff is entitled to judgment, may be waived by the plaintiff; so that, if he does not ask for judgment until some time after the expiration of that period, an affidavit filed since the same, if before actual motion for judgment, is in time.<sup>151</sup> And a plaintiff may waive his right to question the sufficiency of an affidavit of defence filed, by obtaining a rule upon the defendant to plead and taking other steps in the cause;<sup>152</sup> or he may waive altogether his right of requiring the defendant to file an affidavit of defence, or of asking for judgment for want of it, by taking out a rule to arbitrate.<sup>153</sup> Similarly, the party interested may waive the legal formalities in the execution of a writ for the sale of real estate,<sup>154</sup> as well as the provisions of a statute requiring the sale of land upon execution to be made in separate lots or parcels, instead of as a whole.<sup>155</sup> Under the 13 & 14 Vict. c. 61, s. 14, which gave an appeal from a County Court, provided the appellant, within ten days, gave notice of appeal and security for costs; and after directing that the appeal should be in the form of a case, enacted that no judgment of a County Court Judge should be removed into any other court, except in the manner and under the provisions above mentioned; it was held that the want of due notice and security might be waived. The provision was intended for the benefit of the respondent, and was not a matter of public concern (a). [So, a defect in a recognizance for an appeal from an award of arbitrators may be waived.<sup>156</sup>] So, a defendant, even in a criminal case

<sup>151</sup> *Slocum v. Slocum*, 8 Watts (Pa.) 367; *Gillespie v. Smith*, 13 Pa. St. 65; just as, under an act allowing ten days for the filing of an answer, it was held that the latter might be filed at any time thereafter, until some action of the court or of the adverse party concluded the right: *Lewis v. Labauve*, 13 La. An. 382.

<sup>152</sup> *O'Neal v. Rupp*, 22 Pa. St. 395. See, also, *Morrison v. Underwood*, 5 Cush. (Mass.) 52; *Seymour v. Judd*, 2 N. Y. 464.

<sup>153</sup> *Lusk v. Garrett*, 6 Watts & S. (Pa.) 89.

<sup>154</sup> *St. Bartholomew's Church v. Wood*, 80 Pa. St. 219.

<sup>155</sup> *Cunningham v. Cassidy*, 17 N. Y. 276. See ante, § 314.

(a) *Park Gate Iron Co. v. Coates*, L. R. 5 C. P. 634. See, also, *R. v. Long*, 1 Q. B. 740; *Tyerman v. Smith*, 2 E. & B. 719, 25 L. J. 259; *Freeman v. Read*, 4 B. & S. 174; *Palmer v. Metrop. R. Co.*, 31 L. J. Q. B. 259; *Re Regent U. S. Stores*, L. R. 8 Ch. 75. [*S. P.*, as to notice, *Goss v. Davis*, 21 Ala. 479; *Hill v. Bowden*, 3 La. An. 258. But see contra, *Re Gold Str.*, 2 Dak. 39.]

<sup>156</sup> *Walter v. Bechtol*, 5 Rawle (Pa.) 228; *Clarke v. McAnulty*, 3 Serg. & R. (Pa.) 364; *Weidner v. Matthews*, 11 Pa. St. 336.

before a justice of the peace, may waive any irregularity in the summons, or dispense with the summons altogether; and he does so, not, indeed, by appearing merely (*a*), but by appearing and entering on the case on its merits; for he would not be allowed to take his chance of prevailing on the merits, and at the same time to reserve his objections to a preliminary irregularity (*b*). So, where a statute requires justices to make known to a party his right to appeal, and the steps necessary to carry out this right, such as giving notice of appeal and entering into recognizances; the party may waive this provision, and does so by declaring that he does not intend to appeal (*c*).

§ 446. **No Waiver as against Public Policy or Rights of Others.**—But when public policy requires the observance of the provision, it cannot be waived by an individual. *Privatorum conventio juri publico non derogat* (*d*). Private compacts are not permitted either to render that sufficient, between themselves, which the law declares essentially insufficient; or to impair the integrity of a rule necessary for the common welfare; such, for instance, as the enactment which requires the attestation of wills (*e*). Thus, the invalidity of the service of a writ on a Sunday cannot be waived; for it is a matter of public policy that no such proceeding should take place on Sunday (*f*). It is said to be a general understanding in the profession that a prisoner can consent to nothing; at least in the course of his trial (*g*). In criminal matters, a person cannot waive what the law requires (*h*). Where, upon a trial for felony, the jury was discharged, and, at the new trial, some of the witnesses, after being sworn, had their evidence

(*a*) *R. v. Carnarvon*, 5 Nev. & M. 364.

(*b*) *R. v. Barrett*, 1 Salk. 383; *R. v. Johnson*, 1 Stra. 261; *R. v. Aiken*, 3 Burr. 1785; *R. v. Stone*, 1 East, 639; *R. v. Berry*, 28 L. J. M. C. 86; *R. v. Fletcher*, L. R. 1 C. C. 320; *R. v. Smith*, Id. 110; *R. v. Widdop*, L. R. 2 C. C. 3; *Bolton v. Bolton*, 2 Ch. D. 217.

(*c*) *R. v. Yorkshire*, 3 M. & S. 493.

(*d*) Dig. 50, 17, 45. [See, also,

*Scotten v. State*, 51 Ind. 52; and ante, § 444.]

(*e*) *Per Wilson, J.*, in *Haberg-ham v. Vincent*, 2 Ves. J. 227. See New York Civ. Code, Art. 1968, n. 2.

(*f*) *Taylor v. Phillips*, 3 East, 155.

(*g*) *Per cur.* in *R. v. Bertrand*, L. R. 1 P. C. 520.

(*h*) *Per M. Smith, J.*, in *Park Gate Iron Co. v. Coates*, L. R. 5 C. P. 639.



read over to them by the judge from his notes, and the counsel for the Crown and the prisoner had afterwards liberty to examine and cross-examine them; it was held that this course of proceeding vitiated the trial, and that the consent or acquiescence of the prisoner did not cure the irregularity (a). The object of a criminal trial, it was observed, was the administration of justice in a course as free from doubt or chance of miscarriage as human administration of it can be; not the interests of either party.<sup>157</sup> [Nor, of course, can a party consent to the violation of a statute not made for his benefit, but for the security of another; as, where an act forbids a warehouseman to sell, incumber, ship or transfer any goods, etc., for which he shall have given a receipt, without the return of the receipt,—an act intended to protect advances made on the faith of the fact that the goods described in the receipt, which the act makes negotiable, are actually in store, and not for the protection of the depositor,—the consent of the latter to the shipping of the goods without a return of the receipt would not relieve the warehouseman.<sup>158</sup>]

§ 447. **No Waiver of Want of Jurisdiction.**—Consent cannot give jurisdiction (b); and therefore any statutory provision which goes to the jurisdiction does not admit of waiver.<sup>159</sup>

(a) *R. v. Bertrand*, ubi sup.; and see *R. v. Bloxham*, 6 Q. B. 528; *per Pollock, C. B.*, and *Alderson, B.*, in *Graham v. Ingleby*, 1 Ex. 651. *Comp. R. v. Thornhill*, 8 C. & P. 575. See *Exp. Best*, 18 Ch. D. 488, 51 L. J. Ch. 293.

<sup>157</sup> A law requiring the checking of trains in passing a road crossing (held to apply to street crossings in a city) would not be waived by the matter of opening streets and the failure of a city to exercise the power of regulating the running of trains over its streets, if conferred upon it by the Legislature: *Centr. R. R. Co. v. Russell*, 75 Ga. 810.

<sup>158</sup> *Bucher v. Com'th*, 103 Pa. St. 528, 533.

(b) *Lawrence v. Wilcock*, 11 A. & E. 941; *Lismore v. Beadle*, 1

*Dowl. N. S.* 566; *Exp. Robertson*, 20 Eq. 733; *Jackson v. Beaumont*, 11 Ex. 303, 24 L. J. 301. [But where a court, *e. g.*, in Pennsylvania, the court of Quarter Sessions, has general jurisdiction over awarding damages, although in a particular proceeding that jurisdiction is vested in another court, yet a city having invoked the general jurisdiction of the Q. S. for those purposes, will not, after the proceedings have taken their course, without objection and been perfected, be allowed to raise the question of jurisdiction, in order to avoid the payment of the damages assessed for the land taken: *Re Spring Str.*, 112 Pa. St. 258.]

<sup>159</sup> See *Cooley, C. L.*, 493, 506.

It was held that the provision of the 20 & 21 Vict. c. 43, which requires the appellant from a decision of justices to transmit the case in three days to the court of appeal, could not be waived by the respondent, on the ground either that it went to the jurisdiction, or that it related to a criminal case, or that the justices had an interest in the observance of the rule (a). [Where an act extending the jurisdiction of justices of the peace to attachment executions, provided that "the wages of any laborer, or the salary of any person in public or private employment, shall not be liable to attachment in the hands of the employer," it was held that the defect was one of jurisdiction and could not be waived.<sup>160</sup>]

§ 448. **Estoppel from Claiming Benefit of Statute.**—It may be added here, that a person is sometimes estopped by his own conduct, from availing himself of legislative provisions intended for his benefit. For instance, a prisoner for debt, representing a person to be an attorney, to attest a warrant of attorney, who did not belong to that profession, could not afterwards be allowed to impeach the warrant on the ground of inadequate attestation (b); and the grantee of an annuity, on whom the duty is cast of enrolling the deed of grant, would be estopped from taking any advantage from his neglect to enroll it (c). [So, although a borrower cannot, by a contemporaneous prospective agreement waive the provisions of the usury laws,<sup>161</sup> yet the right to set up the defence of usury may be lost by him who would be entitled to set it up; as, where his agent represented to the lender buying a note and mortgage that the same was an honest debt and would be paid;<sup>162</sup> or where the borrower, being the mortgagor,

(a) *Morgan v. Edwards*, 5 H. & N. 415; *Peacock v. R.*, 4 C. B. N. S. 264, 27 L. J. 229. *Comp. Peters v. Sheehan*, 16 M. & W. 213; *Gréat N. R. Co. v. Ivett*, 2 Q. B. D. 284; *R. v. Hughes*, 4 Q. B. D. 615. See the remarks in *Park Gate Iron Co. v. Coates*, L. R. 5 C. P. 634, *dubit*, *Keating, J.*; *Bennett v. Atkins*, 4 C. P. D. 80.  
<sup>160</sup> *Firmstone v. Mack*, 49 Pa. St.

387. See ante, § 444.

(b) *Joyce v. Booth*, 1 B. & P. 97; *Cox v. Cannon*, 4 Bing. N. C. 453.

(c) *Molton v. Camroux*, 4 Ex. 17; *Turner v. Browne*, 3 C. B. 157.

<sup>161</sup> *Bosler v. Rheem*, 72 Pa. St. 54; *Mabee v. Crozier*, 22 Hun (N. Y.) 264.

<sup>162</sup> *Sage v. McLaughlin*, 34 Wis. 550.

allows the property to be sold under a foreclosure, without attempting to avoid the mortgage.<sup>163</sup> In such cases, the borrower would be estopped from asserting his rights under the usury laws, and affecting innocent purchasers with the consequences thereof.<sup>164</sup>]

<sup>163</sup> Elliott v. Wood, 53 Barb. (N. Y.) 285.

<sup>164</sup> See, also, Weaver v. Lutz, 102 Pa. St. 593, ante, § 444.

## CHAPTER XVI.

EFFECT OF STATUTE UPON CONTRACTS MADE IN CONTRAVEN-  
TION THEREOF. PUBLIC AND PRIVATE IMPLIED REMEDIES.

- § 449. Distinction between Void and Illegal Contracts.
- § 450. Contracts Prohibited under Penalty.
- § 451. Contracts Founded on Illegal Consideration.
- § 452. Contracts Connected with, Promoting, Involving or Growing out of Illegal Acts.
- § 454. Sales for Illegal Purposes.
- § 455. Forms, etc., of Contracts Prescribed by Statute.
- § 456. Effect on Contracts of Absence of Statutory Personal Qualifications.
- § 457. When Contract contrary to Statute Upheld. Revenue Laws.
- § 458. Statute Operating on Particular Party or Declaring Particular Result.
- § 459. Statute made for Protection of One Party. Remoteness.
- § 460. Partial Illegality of Contract.
- § 461. Effect of Statute Rendering Performance of Contract Illegal.
- § 463. Statute Implies Means of Enforcement.
- § 464. Implied Remedies Where an Act Prohibits or Commands Something Public.
- § 465. Statute Creating Obligation and giving Remedy in Same Section.
- § 466. Statute Creating Obligation to Pay Money.
- § 467. Statute Creating Public Duty and giving Remedy, in Different Sections.
- § 468. Same Rule as to Private Duties.
- § 469. Where Third Parties Interested in Duties or Prohibitions.
- § 470. Non-performance of New Duty, etc. Penalty Recoverable by Aggrieved Party.
- § 471. Right of Action Limited to those Directly within Gist of Enactment.
- § 472. Former Latitude in this Respect. Later Rule.
- § 473. Special Injury by Breach of Public Duty Necessary for Action. Remoteness.
- § 474. Statutes Foreign to Individual Interests give no Private Action.

§ 449. **Distinction between Void and Illegal Contracts.**—A contract is not illegal merely because it is void or not enforceable. An Act, for instance, which limits the contracting power

of a company to certain contracts only, does not thereby render illegal, though it leaves void, all contracts which do not fall *intra vires* (a). An Act which provided that a professional man should not recover on a contract, unless he was duly qualified, would make the contract of an unqualified person similarly void, but not illegal (b). But when a statute prohibits an act, any contract made respecting it is illegal as well as void (c). What has been done in contravention of an Act of Parliament, it has been said, cannot be made the subject of an action (d). Thus, as the Metropolitan Building Act prohibits the use of combustible materials for building walls in the metropolis, the builder of any such walls could not maintain an action for the price of erecting them (e). A waterman being prohibited by statute from taking an apprentice, unless he was the occupier of a tenement wherein to lodge him; it was held that no settlement was gained by service under an indenture of apprenticeship made contrary to this provision (f). [So, where an act prohibits the employment of a certain class of minors in manufacturing establishments, no right of action accrues for wages earned by a minor falling within that category and prohibition; for no rights can spring from a void and prohibited contract.\* A federal statute declaring all assignment of mail contracts with the United States null and void, a partial assignment of such a contract will not support a promise to pay for the interest thus attempted to be assigned.\* So, agreements to sell rights to a future succession for a particular consideration, being prohibited, are held void in Louisiana.\* Again, where an

(a) See ex. gr. *Ashbury R. Co. v. Riche*, L. R. 7 H. L. 653.

(b) Ex. gr., 55 Geo. 3, c. 194; 21 & 22 Vict. c. 90; *per Willes, J.*, in *Turner v. Reynell*, 14 C. B. N. S. 328, 32 L. J. 164; *Helps v. Glenister*, 8 B. & C. 553; *Holgate v. Slight*, 2 L. M. & P. 662.

(c) *Bartlett v. Vinor*, Carth. 252; *Redpath v. Allen*, L. R. 4 P. C. 511.

(d) *Per Lord Ellenborough*, in *Langton v. Hughes*, 1 M. & S. 593.

(e) *Stevens v. Gourley*, 7 C. B. N. S. 99, sup. § 431.

(f) 10 Geo. 2, c. 31; *R. v. Gravesend*, 3 B. & Ad. 240. [Compare *Reading Overseers v. Cumru Overseers*, 5 Binn. (Pa.) 81.]

\* *Birkett v. Chatterton*, 13 R. I. 299.

\* *Glidden v. Strupler*, 52 Pa. St. 400, 406.

\* *Nix v. Bell*, 66 Ga. 664.

\* *Reed v. Crocker*, 12 La. An. 436. The La. Rev. Civ. Code. 1875, 12, declares that whatever is

act, imposed a penalty on any of enumerated series of gaming operations, and declared every contract, note, bill, etc., given or entered into for security or satisfaction of a debt arising from such operations "utterly void and of none effect," it was held that a note given for a gaming consideration was void even in the hands of an innocent holder for value.<sup>6</sup>]

§ 450. **Contracts Prohibited Under Penalty.**—When a penalty is imposed for doing or omitting an act, the act or omission is thereby prohibited and made unlawful;<sup>7</sup> for a statute would not inflict a penalty on what was lawful (*a*). Consequently, when the thing in respect of which the penalty is imposed is a contract, it is illegal and void. In the case above cited,<sup>8</sup> the Act had declared that it should not be lawful to take the apprentice, and imposed a penalty for doing so (*b*), and in another, where service under an indenture of apprenticeship as a sweep was similarly treated, the statute had not only declared the apprenticeship "void," but imposed a penalty on the master (*c*). [So, where a statute, besides declaring the transfer of a government contract void, punishes the same with annulment of the contract, no action can be maintained upon such transfer.<sup>9</sup>] The joint Stock Companies Act, 7 & 8 Vict. c. 110, s. 24, in enacting that every promoter of a company concerned in making contracts on its behalf before its provisional registration, should be subject to a penalty of 25*l.*, impliedly rendered every such contract illegal and therefore void (*d*). [The National

done in contravention of a prohibitory law is void, although the nullity be not formally declared: *Stimson*, Amer. Stat. L. p. 143, § 1045.

<sup>6</sup> *Harper v. Young*, 112 Pa. St. 419; *Unger v. Boas*, 13 Id. 600. But it said, *Ibid.*, at p. 608, that the indorsee of such a note may sue the indorser on his indorsement.

<sup>7</sup> See, among other cases, *Clark v. Ins. Co.*, 1 Story, 109; *Hallett v. Novion*, 14 Johns. (N. Y.) 273; *Bacon v. Lee*, 4 Iowa, 490; *Mitchell v. Smith*, 1 Binn. (Pa.) 110; *Lewis v. Welch*, 14 N. H. 294; *Skelton*

*v. Bliss*, 7 Ind. 77; also cases *infra*.

(*a*) *Per* Lord Holt in *Bartlett v. Vinor*, *ubi sup.*; *per* Lord Hatherley in *Re Cork, etc.*, R. Co., L. R. 4 Ch. 748.

<sup>7</sup> *R. v. Gravesend*, 3 B. & Ad. 240, ante, § 449.

(*b*) 10 Geo. 2, c. 31; *R. v. Gravesend*, *ubi sup.*

(*c*) 28 Geo. 3, c. 48 *R. v. Hipswell*, 8 B. & C. 486.

<sup>8</sup> *Turnbull v. Farnsworth*, 1 Wash. 444.

(*d*) *Bull v. Chapman*, 8 Ex. 444; and see *Abbot v Rogers* 16 C. B. 277.

Currency Act of 3 June, 1864, which permits national banks to "purchase, hold and convey" real estate in certain prescribed cases, among which it enumerates "such as shall be mortgaged to it in good faith by way of security for debts previously contracted," having provided that "such association shall not purchase or hold real estate in any other case," etc., punishes a violation of any provisions of the act by inflicting personal liability upon the directors, and, sub modo, forfeiture of the corporate franchise. It was held that a mortgage taken by a national bank to secure future discounts was absolutely void, and that the assignee for the benefit of creditors of the mortgagor might resist its enforcement upon that ground.<sup>9</sup> So, a contract between a citizen of the United States and an alien, whereby the former undertook to purchase vessels and cargoes in his own name, for the latter, to equip, register and navigate them in the name of the former, for the use of the latter, and in like manner to import the return cargo, in fraud of the registry and revenue acts of the United States,<sup>10</sup> which prohibited such transactions under penalty of forfeiture of the vessel, with her tackle, apparel and furniture, was held to afford no basis for an action in American courts." The highway Act, 5 & 6 Wm. 4, c. 50, s. 46, in imposing a penalty of ten pounds on a road surveyor who had any share in a contract for supplying work or materials, or horse labor, for any of his highways, without the written license of two justices, was equally fatal to his recovering any payment for such supplies or services (*a*). [So, where an act punishes "any officer of any county, . . . city, or town, . . . who shall contract directly or indirectly, or become in any way interested in any contract, for the purchase of any draft or order on the treasury," an agreement between a sheriff, at the time ex officio collector of his county, and another, whereby each was to furnish equal amounts of money to be invested in county scrip, the profits to be divided, was held illegal and

<sup>9</sup> Fowler v. Scully, 72 Pa. St. 456.

<sup>10</sup> See Act 31 Dec. 1792, 2 U. S. Laws 131.

<sup>11</sup> Maybin v. Coulon, 4 Dall. (Pa.) 298; 4 Yeates, 24.

(*a*) Barton v. Pigott, L. R. 10 Q. B. 86.

void."<sup>12</sup> So, under the Pennsylvania statute of 11 April, 1795, a contract for the purchase and sale of lands under the Connecticut title, and a bond given for the purchase-money thereof, were held illegal and void, although the statute merely inflicted a penalty on the offender against its prohibition.<sup>13</sup>] The 50th section of the Merchant Shipping Act of 1854, which enacts that the certificate of a ship's registry shall be used only for the navigation of the ship, and imposes a penalty on any person in possession of it, who refuses to give it up to the person entitled to its custody for the purposes of navigation, impliedly prohibits its use for any other purpose; rendering a pledge of it illegal and void, and giving no right to detain it even against the pledgor, if the right of possession and property is vested in him (a).

§ 451. **Contracts Founded on Illegal Consideration.**—[It has been so often decided as to have become a sort of legal maxim, that, where any matter or thing is made illegal by statute, whether by express prohibition or by being made subject to a penalty, a contract founded directly upon such matter or thing as its supporting consideration, is itself rendered illegal and void,<sup>14</sup> as, where the consideration was brandy manufactured and sold in violation of the revenue laws,<sup>15</sup> or smuggled goods;<sup>16</sup> or work done with a threshing machine, the truckles and rod-boxes of which, at the time of the work, were not covered or inclosed as required by a statute which made the omission of these precautions for the safety of persons running such machines punishable as a misdemeanor.<sup>17</sup>]

<sup>12</sup> Read v. Smith, 60 Tex. 379.

<sup>13</sup> Mitchell v. Smith, 4 Dall. (Pa.) 269.

(a) Wiley v. Crawford, 1 E. B. & E. 253, 29 L. J. 244, 30 Id. 319.

<sup>14</sup> See 1 Pars., Contr., pp. \*456-459.

<sup>15</sup> Creekmore v. Chitwood, 7 Bush (Ky.) 317.

<sup>16</sup> Condon v. Walker, 1 Yeates (Pa.) 483.

<sup>17</sup> Ingersoll v. Randall, 14 Minn. 400. See, also, the following cases: Bell v. Quin, 2 Sandf. (N. Y.) 146; Nourse v. Pope, 13 Allen (Mass.)

87; Bayley v. Taber, 5 Mass. 286; Wheeler v. Russell, 17 Id. 258; Farrar v. Barton, 5 Id. 395; Stanley v. Nelson, 28 Ala. 514; Milton v. Haden, 32 Id. 30; Biddis v. James, 6 Binn. (Pa.) 321; Seidenbender v. Charles, 4 Serg. & R. (Pa.) 151; Ellsworth v. Mitchell, 31 Me. 247; Elkins v. Parkhurst, 17 Vt. 105; Spalding v. Preston, 21 Id. 9; Roby v. West, 4 N. H. 285; Carlton v. Whitchee, 5 Id. 196; Bracket v. Hoyt, 29 Id. 264; Coburn v. Odell, 30 Id. 540; Solomon v. Dreschler, 4 Minn. 278;



§ 452. **Contracts Connected with, Promoting, Involving, or Growing out of Illegal Acts.**—Further, any contract connected with or growing out of an act which is illegal (not merely void), is also invalid. Thus, a contract to dance at a theatre not duly licensed could not be enforced by action (*a*). [A check given by defendant to a country agricultural society in payment of the entrance fee for his horse, to compete for premiums offered by the society in trials of speed, horse-racing being made penal by statute, cannot be made the basis of a recovery against him;<sup>18</sup> nor can money loaned in “poker chips,” and used at a prohibited game of chance, be recovered back.<sup>19</sup>] It being unlawful for any election agent, except the expense agent, to make any payments on behalf of a candidate, even for current expenses, an agent who made any such payments could not, for this reason, recover the amount from his principal (*b*). [So, contracts whose tendency is to promote, or the performance of which involves, the doing of acts that are prohibited or made penal by statute, are illegal and void, though the statute be silent as to their effect.<sup>20</sup> Such is a contract to ship goods from one part of the United States to another in a foreign bottom.<sup>21</sup> And so, too, an agreement to give one the deputation of a public office, with the fees and costs thereof, he to pay thereout a specified sum, is illegal and void, together with the notes given to secure such payment, as against a statute forbidding the sale of public offices.<sup>22</sup> Where a statute makes it penal to “establish, institute, or put in operation, or to issue any bills or notes for the purpose of erecting, establishing or putting in operation any

Hall v. Mullin, 5 Har. & J. (Md.) 193; Downing v. Ringer, 7 Mo. 585; Madison Ins. Co. v. Forsyth, 2 Ind. 483; Siter v. Sheets, 7 Id. 132; Hale v. Henderson, 4 Humph. (Tenn.) 199; and cases infra.

(*a*) Gallini v. Laborie, 5 T. R. 242. See, also, De Begnis v. Armistead, 10 Bing. 110; Levy v. Yates, 8 A. & E. 129; Elliot v. Richardson, L. R. 5 C. P. 749.

<sup>18</sup> Comly v. Hillegass, 94 Pa. St. 132.

<sup>19</sup> Williamson v. Baley, 78 Mo. 636.

(*b*) 26 & 27 Vict. c. 29; *Re* Parker, 21 Ch. D. 408.

<sup>20</sup> Dillon v. Allen, 46 Iowa, 299.

<sup>21</sup> See *Petrel Guano Co. v. Jarnette*, 25 Fed. Rep. 675; and the remission of the forfeiture by the United States cannot validate the contract as between the parties: *Ibid.* See post, § 488.

<sup>22</sup> Grant v. McLester, 8 Ga. 553; and see *O'Rear v. Kiger*, 10 Leigh (Va.) 622.

banking institution, association, or concern," the initiatory steps for such purpose, all transactions by which the forbidden currency is put in circulation, and all contracts in furtherance of such transactions are rendered illegal and void.<sup>28</sup>]

§ 453. As the Pawnbrokers' Act, 39 & 40 Geo. 3, c. 99, requires that for the better manifesting by whom the business of a pawnbroker is carried on, every person who carries it on shall cause his name to be painted over his shop; an agreement for a partnership in that business, which included a stipulation that the name of one of the partners should not be painted up, would be illegal and void (a). And so would be an agreement to let premises to a person, with the object of enabling him to sell spirituous liquors there without a license (b). Where an Act provided that before a ship sailed, the master should obtain the clearing officer's certificate that the whole cargo was below deck, and forbade him, under a penalty, either to sail without the certificate or to place any cargo on deck; a voyage in contravention of these provisions would be illegal, and a policy of insurance on the cargo effected by its owner, who was privy to the transaction, void (c). The 25 & 26 Vict. c. 89, in enacting that no company of more than twenty persons should be formed for carrying on any business for gain, unless it were registered, rendered illegal and void all contracts for carrying on its business if the company was not registered (d). So where a statute, under penalty of fine for misdemeanor, prohibits persons from transacting business in the name of a partner not interested in the firm, and requires, that, where the addition "& Co." is used, it shall represent an actual partner, the effect, although unexpressed in the statute, is to

<sup>28</sup> Davidson v. Lanier, 4 Wall. 447.

(a) Armstrong v. Lewis, 2 C. & M. 274; Warner v. Armstrong, 3 M. & K. 45; Gordon v. Howden, 12 Cl. and F. 287; Fraser v. Hill, 1 Macq. 392. [Comp. § 457.]

(b) Richie v. Smith, 6 C. B. 462.

(c) See the two cases of Cunard

v. Hyde, 2 E. & E. 1, and 1 E. B. & E. 670; Wilson v. Rankin, 6 B. & S. 208, 34 L. J. 62; Dudgeon v. Pembroke, L. R. 9 Q. B. 581; Atkinson v. Baker, 11 East, 135.

(d) *Re* Padstow Assur. Assoc., L. R. 20 Ch. D. 187; Jennings v. Hammond, 9 Q. B. D. 225.

render the prohibited dealings illegal and executory contracts unenforceable by the person engaging therein."<sup>24</sup>]

§ 454. **Sales for Illegal Purposes.**—Where a statute prohibited brewers from using any ingredients but malt and hops in brewing beer, it was held that a druggist who sold drugs to a brewer with the knowledge that they were to be used in making beer, contrary to the Act, and under circumstances which made him a participator in the illegal transaction, could not recover the price of the drugs (*a*). [So the vendor of land sold to the projector of a prohibited lottery or gift enterprise, to be used as prizes in the scheme, cannot recover the price stipulated therefor, or any unpaid balance due thereon.<sup>25</sup>] But mere knowledge of the purposed illegality, without actual participation or privity in it, would not affect the contract. Thus, a sale of goods in a foreign country, with the knowledge that the purchaser intended to smuggle them into England, but without any participation in the transaction (*b*), [or a sale of liquors in a state where the sale was legal, with knowledge that the vendee intended to sell them in his state, where the sale was prohibited,<sup>26</sup>] would not be invalid.

§ 455. **Forms, etc., of Contracts Prescribed by Statute.**—The question has frequently arisen, when an Act prescribes regulations, forms, or other attendant circumstances, more or less immediately connected with contracts, either with or

<sup>24</sup> *Swords v. Owen*, 43 How. Pr. (N. Y.) 167; 34 N. Y. Supr. Ct. 277. And see *Zimmerman v. Erhard*, 58 How. Pr. (N. Y.) 11; 8 Daly, 311, that the addition " & Co." may represent the wife. See, also, *Noel v. Kinney* (N. Y.), 8 Centr. Rep. 58.

(*a*) See *Holman v. Johnson*, Cowp. 341; *Abbot v. Rogers*, 16 C. B. 277; *Langton v. Hughes*, 1 M. & S. 593; *Hodgson v. Temple*, 5 Taunt. 81; 5 *Paxton v. Popham*, 9 East, 408; *Gaslight Co. v. Turner*, 6 Bing. N. C. 324. See, also, *Bridges v. Fisher*, 3 E. & B. 642, 23 L. J. 276; *Geere v. Mare*, 2 H. & C. 339, 33 L. J. 50; *Clay v. Ray*, 17 C. B. N. S. 188; *Hobbs v. Henning*, 17 C. B. N. S. 791, 34

L. J. 117; *Beeston v. Beeston*, 1 Ex. D. 13; *Brooker v. Ward*, 5 B. & Ad. 1052.

<sup>25</sup> *Hooker v. De Palos*, 28 Ohio St. 251.

(*b*) *Holman v. Johnson*, Cowp. 341; comp. *Waymell v. Read*, 5 T. R. 599; *Lightfoot v. Tennant*, 1 Bos. & P. 551. See *Hobbs v. Henning*, 17 C. B. N. S. 791; 34 L. J. 117.

<sup>26</sup> *Smith v. Godfrey*, 28 N. H. 379. (See *Howell v. Stewart*, 54 Mo. 400, post, § 458, note 48.) But, where the seller so packed the liquor as to show an attempt to conceal the fact that it was liquor, the aid of the N. H. courts was refused him to recover. *Fisher v. Lord*, 63 Id. 514.

without penalties for non-compliance, whether a contract entered into in disregard of any of them is thereby prohibited, and so illegal, or whether the object of the Act is not sufficiently attained by the imposition of the penalty; and the chief test for its decision seems to be whether the provisions have, or not, some object of general policy, which requires that the contract should be invalidated. [Where a statute prohibits the making of contracts in any but a prescribed manner, they are, of course, void, if made in any other;"] and, in general, if a statute prohibiting something to be done cannot otherwise be made to accomplish the object intended to be effected by it, whatever is done in contravention of its prohibition must be adjudged void and inoperative.<sup>27</sup>] Thus, it has been held that enactments which required, under penalties, that all bricks made for sale should be of at least certain specified dimensions (*a*); or that persons who sold corn, except by certain measures, should be liable to a penalty (*b*); or that vendors of coals should, under a penalty, deliver, with the coals sold, a ticket setting forth their weight and the number of sacks in which they are contained (*c*); or that farmers and others should sell butter in firkins of a certain size, branded with their own and the maker's names (*d*); [that vendors of artificial fertilizers should cause the same to be branded, tagged and inspected before offering them for sale;<sup>28</sup>] prohibited all contracts made

<sup>27</sup> *Ætna Ins. Co. v. Harvey*, 11 Wis. 394; *e. g.*, the prohibition against a foreign insurance company's doing business in a state, without a license from the same: *Ibid.*, *cit. Williams v. Cheeney*, 3 Gray (Mass.) 215; *Jones v. Smith*, *Id.* 500. But see *Columbus Ins. Co. v. Walsh*, 18 Mo. 229; *Clark v. Middleton*, 19 *Id.* 53. *Comp. post*, § 458, *Brooklyn Life Ins. Co. v. Bledsoe*, 52 Ala. 538.

<sup>28</sup> *Nelson v. Denison*, 17 Vt. 73. (*a*) *Law v. Hodson*, 11 East, 300.

(*b*) *Tyson v. Thomas*, McCl. & Yo. 119.

(*c*) *Little v. Poole*, 9 B. & C. 192; *Cundell v. Dawson*, 4 C. B. 376.

(*d*) *Forster v. Taylor*, 5 B. & Ad. 887.

<sup>29</sup> *Conley v. Sims*, 71 Ga. 161. In this case, it appears, the vendor had three kinds of fertilizers in his warehouse, two of them inspected, the third not inspected, branded or tagged. The bags of these three kinds were cut in the house, and after all the sound bags with tags were sold, the refuse mixture was gathered up and bagged, tags were procured from persons other than inspectors and attached to the bags, and the mixture sold. It was held that the sale was illegal and void, and not the basis of an action. Compare *Niemeyer v. Wright*, 75 Va. 239, where it was said, that, when a statute prohibiting and punishing, or merely

in disregard of such provisions, and made them void, so that no action could be maintained for the price of the goods sold. On the same ground, where printers were required to affix their names to the books which they printed, it was held that a printer could not maintain an action for his work and materials in printing a book in which he had omitted to comply with this statutory provision (*a*). The policy of these Acts was to prevent all such dealings; and it would have been imperfectly attained, if the sellers had been merely subjected to a penalty, while the purchasers remained liable to be sued.

§ 456. **Effect on Contracts of Absence of Statutory, Personal Qualification.**—The same stringent effect has been given to enactments which imposed, under a penalty, regulations relating to personal qualification. Thus, an Act which imposed a penalty on an unqualified person who drew conveyances for reward, would invalidate any contract with him for such a purpose (*b*). So, an Act which imposed penalties on persons for acting as brokers in the City of London, who had not been admitted and paid certain fees for the benefit of the city (inasmuch as its object was, not the enrichment of the citizens of London, but the protection of the public by preventing improper persons from acting as brokers), was held to invalidate the dealings of an unqualified broker, so far as to prevent him from recovering payment for his services in that capacity (*c*). [One who sells liquors without license,<sup>30</sup> or follows the occupation of a peddler

punishing an act is silent and contains nothing from which the contrary can be inferred, a contract in contravention of it is void,—but not always where it merely imposes a penalty for doing or omitting a thing. In this case the act concerning the sale of fertilizers was highly penal, and also gave a remedy to persons injured, by recovery against the seller. It was said, at p. 247, that “the infliction of the forfeiture in one aspect is the exclusion of it in any other.” See post, § 458.

(*a*) *Bensley v. Bignold*, 5 B. &

A. 335; and see *Stephens v. Robinson*, 2 C. & J. 209.

(*b*) 44 Geo. 3, c. 98; *Taylor v. Crowland Gas Co.*, 10 Ex. 293.

(*c*) 6 Anne, c. 16; *Cope v. Rowlands*, 2 M. & W. 149. But it would not affect his right to recover from his employer money paid on his behalf to complete the irregular purchase; for this was a transaction distinct from his character of broker: *Smith v. Lindo*, 5 C. B. N. S. 587. Comp. *Steel v. Henley*, 1 C. & P. 574; *Latham v. Hyde*, 1 C. & M. 128.

<sup>30</sup> *Bach v. Smith*, 2 Wash. 145

without license," where the law requires such, and punishes dealings without license, cannot recover the price of the articles so sold, nor sue upon a promissory note given therefor.<sup>22</sup> Nor, where a statute requires engineers on steamboats to be licensed, can one who is not, recover stipulated wages for services as such;<sup>23</sup> nor can an unlicensed commission broker recover commissions for his services, where a statute requires such persons to be licensed and punishes one acting in that capacity without license.<sup>24</sup>

§ 457. **When Contract Contrary to Statute Upheld. 'Revenue Laws.**—But where the object of the Act is sufficiently attained without giving the prohibition so stringent an effect, and where it is also collateral to or independent of the contract, the statute is understood as not affecting the validity of the contract. [Indeed, the solution of the question, whether or not a statute is to have the effect of rendering acts and contracts in contravention of it illegal and void, depends upon the intent of the Legislature, as gathered from the entire enactment.<sup>25</sup> It has been said that such an intent is to be presumed unless the contrary can be fairly inferred.<sup>26</sup> On the other hand, it has been asserted, that, if the imposition of the penalty upon, or the prohibition under a penalty of, an act or contract, is simply for the purpose of raising or protecting the revenue, an action may nevertheless be based upon it; *i. e.*, whilst the penalty may be incurred, the act or contract is not itself illegal and void.<sup>27</sup>

<sup>21</sup> Bull v. Harragan, 17 B. Mon. (Ky.) 349.

<sup>22</sup> Contracts of sale made by a merchant in his business during a time when he carried it on without the required license, were of course held void under an act which in terms declared them so: Decell v. Lewens, 57 Miss. 331; Anding v. Levy, *Id.* 51. See Lindsey v. Rutherford, *infra*.

<sup>23</sup> The Pioneer, Deady, 72.

<sup>24</sup> Holt v. Green, 73 Pa. St. 198. But a contract of sale or purchase made with such a broker would be valid, though both the buyer and seller may have incurred the penalty

of an act which is a mere revenue measure designed to raise revenue from a business esteemed by the Legislature as profitable: see Lindsey v. Rutherford, 17 B. Mon. (Ky.) 245. Comp. post, § 457.

<sup>25</sup> See Bemis v. Becker, 1 Kan. 226; Vining v. Bricker, 14 Ohio St. 331.

<sup>26</sup> Bemis v. Becker, *supra*; Niemeyer v. Wright, 75 Va. 239. Compare Pratt v. Short, 79 N. Y. 437, § 458.

<sup>27</sup> See Swan v. Blair, 3 Cl. & Fin., at p. 632, *per* Lord Brougham; Lindsey v. Rutherford, 17 B. Mon. (Ky.) 245, 248, *ante*, § 456, note 24.

But this proposition has been doubted altogether," and it would seem clear that it cannot apply where there is an express prohibition of the act or contract, either for the protection of the revenue or for any other purpose." If, however, there is no express prohibition of the act or contract, but "a penalty is imposed on contracts or dealings for the purpose of protecting the revenue, and of providing for the proper payment of duties, no prohibition is implied by law, and such contracts or dealings, though they render the persons who engage in them liable to a penalty, may be enforced by action."<sup>38</sup>] Thus, where an Act subjected every licensed distiller to a penalty of 200*l.*, if he sold spirits by retail, or even wholesale, anywhere within two miles of the distillery, and required that every license should state the name and abode of every person licensed; it was held that the omission, in the license, of the name and abode of one of the five partners in a distillery, and the retailing of spirits by him, did not affect the sale, so as to prevent the partnership from recovering the price (*a*). So, the provisions of an Act which imposed penalties on every dealer in tobacco who omitted to paint his name over the entrance of his premises, or who dealt in tobacco without a license, were understood as not affecting the validity of a contract by a tobacconist who had neglected to comply with them. They were mere fiscal regulations, the breach of which was unconnected with the contract; their object was to protect the revenue, and this was completely attained by the enforcement of the penalty (*b*). The Pawnbrokers' Act, 39 & 40 Geo. 3, c. 99, already referred to, affords an illustration of the two classes of cases. It requires a pawnbroker to paint his name and business over his door; and it also requires that before he makes any advance on a pledge, he shall make certain inquiries of the pledgor as to his name, abode, and condition in life, and shall enter the results of them in his

<sup>38</sup> See 1 Pars., Contr., p. \*459.

<sup>39</sup> Wilb., Stat. L., p. 84, cit. Cope v. Rowlands, 2 M. & W. at p. 157. *per* Parke, B.

<sup>40</sup> Wilb., Stat. L., pp. 83-84.

(*a*) Brown v. Duncan, 10 B. & C. 93; Hodgson v. Temple, 5

Taunt. 181; Johnson v. Hudson, 11 East, 180; Wetherell v. Jones, 3 B. & Ad. 231; Bailey v. Harris, 12 Q. B. 905.

(*b*) Smith v. Mawhood, 14 M. & W. 452.

books and on the duplicate. A breach of the former provision would not affect the validity of a pledge; but a breach of the latter would do so, for they are directly and immediately connected with the contract (a). The object of the Legislature by such regulations, which was to guard against abuses, would be but imperfectly attained if the contract were held good.

§ 458. **Statute Operating on Particular Party or Declaring Particular Result.**—[And it would seem, that, where a statute imposing a penalty upon the doing of an act singles out as the object of its prohibition one of the parties to the transaction, or has in contemplation only one particular person or class of persons as intended to be affected and punished by it, it will not, in the absence of an express declaration that contracts involving a disregard or breach of its provisions shall be affected with illegality, be construed as producing this result, especially where the effect would be to prejudice honest claims and permit dishonest defences. The court will not ignore, in arriving at a conclusion upon this question arising under a particular act, the whole language and subject-matter of the same, the evil it is intended to remedy or prevent, the purposes it seeks to accomplish; and whilst adhering to the rule of refusing its aid to one whose cause of action is founded upon a prohibited transaction," even with the consent of parties," it will not extend that rule "so far as to encourage violations of contracts for payment of honest debts, as between the parties, because they grow out of tainted originals.""] Thus, where an act imposed a penalty upon any person selling or leasing any lot in any town, city, or addition thereto, until the plot thereof had been duly acknowledged and recorded, it was held that no prohibition of the sale itself was implied, but only a penalty imposed upon the seller; that, therefore, the purchase of a lot, the plot of which was unrecorded, etc., was valid," and con-

(a) *Fergusson v. Norman*, 5 Bing. N. C. 76, better reported 6 Scott, 794. [Comp. § 453.]

<sup>41</sup> *Pangborn v. Westlake*, 86 Iowa, 546.

<sup>42</sup> *Ibid.*; *Watrous v. Blair*, 32 Iowa, 58; *Bly v. Nat. Bank*, 79

Pa. St. 453.

<sup>43</sup> *Fowler v. Scully*, 72 Pa. St. 456.

<sup>44</sup> *Bly v. Nat. B'k*, *supra*, at p. 456, *per* Trunkay, P. J., approved; at p. 459, *per* *Our*.

<sup>45</sup> *Watrous v. Blair*, *supra*; *Strong v. Darling*, 9 Ohio, 201.



sequently a note given for the purchase money or such a lot, recoverable.<sup>46</sup>] It has been held that an enactment, which provided that no person interested in a contract with a company should be capable of being a director, and that if a director of a company were concerned in any contract with the company, he should cease to be a director, did not, at law, invalidate such a contract (*a*). [And the fact that a contractor for the construction of a railroad had agreed with one of the directors of the company, to divide with him the profits of the contract was held not to render void the bonds issued in payment of work done under the contract, by reason of an act which declared any director, etc., who directly or indirectly had a contract with the company guilty of a felony, made ineligible as a director any person having an interest in such a contract, and declared void the contracts made by the directors of a company containing any such person in its board of directors.<sup>47</sup> And where an act made the introduction of Mexican, Indian or Texan cattle at a certain season a misdemeanor in the drover, it was held that the lender of money for such purpose was nevertheless not barred from a recovery of the same.<sup>48</sup> Upon a similar principle, it would seem, it was held, that, unless a statute prohibiting an act also declares it void, a party not privy to the act itself, nor involved in its guilt, may recover from the guilty actor.<sup>49</sup> Similarly, it is said, that, where a prohibitory act points out the consequence of its violation, and it appears to have been the legislative intent to exclude any other penalty or forfeiture, then such as is declared in the statute, and no other,

<sup>46</sup> Pangborn v. Westlake, *supra*.

(*a*) Foster v. Oxford, &c., R. Co., 13 C. B. 200, 22 L. J. 99. Comp. Barton v. Port Jackson Co., 17 Barbour, New York R. 397. In equity, the contract would be void: Aberdeen R. Co. v. Blaikie, 1 Macq. 461.

<sup>47</sup> Chouteau v. Allen, 70 Mo. 290, Sherwood, C. J., and Norton, J., diss. See post, § 459.

<sup>48</sup> Howell v. Stewart, 54 Mo. 400, it being there said, that, apart from felonies or crimes involving great moral turpitude, the mere knowledge of the lender or vendor that the money loaned or property

sold is designed to be applied to an unlawful purpose, will not prevent a legal recovery based on such loan or sale. See § 454.

<sup>49</sup> Brooklyn Life Ins. Co. v. Bledsoe, 52 Ala. 538, cit. Whetstone v. Bank, 9 Id. 875. The former was the case of an insurance company doing business in the state without complying with its laws. It was held that the company, not the citizen with whom it contracted, violated the statute, and that the latter could not avail itself of its own wrong to avoid the contract. Comp. ante, § 455, Aetna Ins. Co. v. Harvey, 11 Wis. 394.

will be enforced, and an action may be maintained upon the transaction of which the prohibited act was a part, if it can be done without sanctioning the illegality.<sup>50</sup> Thus, where an act incorporating a safe deposit and savings institution gave it power to loan its funds, but restricted the investment of them to certain specified securities, not including commercial paper, it was held, that, as discounting such paper was prohibited to any corporation not authorized by law thereto, and paper discounted contrary to the prohibition was declared void, a promissory note discounted by the company was necessarily void; but that the illegal act of the directors in making the discount did not forfeit the money loaned, and that it might be recovered, though the security was void.<sup>51</sup>

§ 459. **Statute Made for Protection of One Party. Remote-ness.**—[It is said, that, whilst an act declared void by the Legislature upon grounds of public policy is void to all intents, if the manifest purpose of a statutory prohibition is to protect certain individuals in their own rights, they only are entitled to take advantage of it.<sup>52</sup> It would seem to follow from this principle, that, when a statute prohibits the doing of an act for the protection of a particular party, as *e. g.*, in the case of the statute which forbids national banks to loan to any one party a sum exceeding in amount one-tenth of their capital stock,<sup>53</sup> whilst it would subject the persons violating the prohibition to the penalties prescribed, it would not render the contract made in violation of the same illegal and irrecoverable. Such, indeed, as has already

<sup>50</sup> Pratt v. Short, 79 N. Y. 437. See Niemeyer v. Wright, 75 Va. 239, ante, § 455, note 29.

<sup>51</sup> Pratt v. Short, *supra*.

<sup>52</sup> Beecher v. Roll'g Mill Co., 45 Mich. 103.

<sup>53</sup> See O'Hare v. Nat. B'k, 77 Pa. St. 96. As to the effect of a statutory requirement to insert in certain contracts a stipulation that eight hours shall be a day's labor (held to be intended merely for the protection of laborers), upon a contract from which that stipulation was omitted, see Babcock v. Goodrich, 47 Cal. 488, ante, § 268. In

U. S. v. Martin, 94 U. S. 400, where it was held, that, in spite of the Eight-hour law, a valid agreement might be entered into making a day's labor more or less than eight hours, the Court, at p. 404, says: "We regard the statute chiefly as in the nature of a direction from a principal to his agent, that eight hours is deemed to be a proper length of time for a day's labor, and that his contracts shall be based upon that theory. It is a matter between the principal and his agent, in which a third party has no interest."

been seen," is the construction placed upon such enactments. Nor, where the origin of a contract is founded in an illegal transaction, but the latter, at the time and in the shape in which the contract is pressed for enforcement, has become so remote that it requires no aid from the illegal transaction to support it, will the court go back to its first inception and give the statute against which it offended the effect of avoiding it. "If an act in violation of either statute or common law be already committed and a subsequent agreement entered into, which, though founded thereupon, constituted no part of the original inducement or consideration, such agreement is valid."<sup>54</sup> Hence, in a suit by a national bank against an endorser on a note discounted for the drawer, a defence averring that the defendant was an accommodation endorser, that part of the consideration of the note was a balance for which the drawer had become liable as accommodation endorser for another who had borrowed of the bank in excess of ten per cent. of its capital, would, even if the latter could have been a defence as to the original transaction, be insufficient to bar a recovery by the bank against the defendant; the plaintiff requiring no aid from the original transaction to make out its case, and the defendant's attempt being to defeat a recovery, not by showing anything done at the time his obligation was given, but because of the offence of the borrower and lender in the remote original transaction.<sup>55</sup>

[It may be here added, that, whatever the solution of this delicate question of the effect of a statutory prohibition upon the legality of acts and contracts in disregard of it, may, in any particular instance, be, the question whether the act prohibited is *malum prohibitum* or *malum per se*, is said to have nothing to do with it.<sup>57</sup>]

<sup>54</sup> Ante, § 137. See, also, § 458.

<sup>55</sup> *Thomas v. Brady*, 10 Pa. St. 164, 170, quoting and approving *Story, Contracts*, § 227.

<sup>56</sup> *Bly v. Nat. B'k*, 79 Pa. St. 453.

<sup>57</sup> *Holt v. Green*, 73 Pa. St. 198, 200. *Comp. Dupre v. McCright*, 6 La. An. 146, 147, where this distinction is hinted at, and *Hill v.*

*Smith, Morr. (Ia.)* 70, where it is said, that, if the act to which a penalty is attached is not intrinsically wrong, nor contrary to public policy, the penalty satisfies the law, and that, consequently, the attaching of a penalty to an act does not necessarily render illegal all contracts in relation thereto, as if the act had been expressly and absolutely

§ 460. **Partial Illegality of Contract.**—It was once considered a rigid rule that when the bad part of a contract was made illegal or void by statute, the whole instrument was invalidated; while, if the invalid part was void at common law, the remainder of the instrument was valid; a statute being, it was said, strict law, while the common law divided according to common reason (*a*); or again, the former, like a tyrant, making all void; the latter, like a nursing father, making void only the part where the fault is, but preserving the rest (*b*). But this is not the true test. The question whether the whole instrument, or only the invalid part is void, depends on the more rational ground whether the vitiated part be severable from the rest, or not. If the one cannot be severed from the other part, the whole is void; but if it be severable, whether the illegality was created by statute or by the common law, the bad part may be rejected, and the good retained (*c*). If a deed was made on a consideration, part of which was illegal, the whole instrument would be void, for every part of it would be affected by the illegal consideration (*d*); and a contract of which the consideration is in any part illegal, cannot be enforced; [as, where some of the transactions between the payee and maker of a note secured by mortgage were illegal gaming, transactions the whole security is void.<sup>88</sup>] But it would be otherwise if only some of the promises which constituted the consideration were illegal, and the illegality did not taint the rest. Thus, although a rent-charge on a living was invalidated by a statute, which declared all chargings of benefices with pensions utterly void; a covenant in the deed which created such a charge, to pay it, was held good and was enforced (*e*). So, though a bill of sale transferring

prohibited; *e. g.*, a note given for improvements upon public lands. And see *Howell v. Stewart*, 54 Mo. 400, ante, § 458, note 48.

(*a*) *Norton v. Simmes*, Hob. 14.

(*b*) *Maleverer v. Redshaw*, 1 Mod. 35; *Mosdel v. Middleton*, 1 Ventr. 237.

(*c*) See *per Willes, J.*, in *Pickering v. Ilfracombe R. Co.*, L. R. 3 C. P. 250; *Biddell v. Leader*, 1 B.

& C. 327; *Exp. Browning*, L. R. 9 Ch. 583.

(*d*) *Per Tindal, C. J.*, in *Waite v. Jones*, 1 Bing. N. C. 662, 1 Scott, 730; and *Shackell v. Rosier*, 3 Scott, 59, 2 Bing. N. C. 646; *Collins v. Gwynne*, 9 Bing. 544.

<sup>88</sup> *Barnard v. Backhaus*, 52 Wis. 593.

(*e*) *Mouys v. Leake*, 8 T. R. 411.

a ship by way of mortgage was void, in consequence of the omission to recite the certificate of registry, a similar covenant, by the mortgagor, to repay the money advanced, and secured by the same deed, was held valid and binding (a). So, a tenant may be sued on his covenant to pay his rent clear of all taxes, although in another part of the lease he covenants to pay the landlord's property tax; an engagement which was penal and void (b). [Again, where an auctioneer, licensed to sell property in a certain county, had sold seventy-six lots of ground, two of which were in his proper county, and the rest in another in which it was illegal for him to sell, he was permitted to recover for the former, on the ground that the claim was not upon an entire contract, the sale of each lot being a distinct contract and basis of claim, and there being no express promise to pay a fixed sum as compensation for the entire sale.<sup>59</sup> By way of contrast, and as illustrating this distinction, may be cited the case of a candidate for office agreeing to pay to an association of persons conducting the election a certain sum assessed by them against him as his share of expenditures made by them: if any part of their expenditures were within the prohibition of a statute making it illegal for candidates to contribute money for election expenses, except for certain specified purposes, the whole contract was illegal and void, although more than the sum assessed and agreed to be paid was, in fact, expended for purposes for which he might lawfully contribute.<sup>60</sup> Again, there is said to be a marked distinction in the object of statutes which avoid a particular provision in an instrument, and that of those which avoid the whole instrument, on account of the illegality of the purpose of a part. In the former case, such a provision is made void as a matter of policy as to it alone; in the latter, the whole instrument is looked upon as an engine of fraud or other violation of the statute,

(a) *Kerrison v. Cole*, 8 East, 231.

(b) See, also, *Gaskell v. King*, 11 East, 165; *Howe v. Synge*, 15 East, 440; *Readshaw v. Balders*, 4 Taunt. 57; *Greenwood v. Hammersley*, 5 Taunt. 726; *Pallister v. Gravesend*, 9 C. B. 774; *The*

*Buckhurst Peerage*, 2 App. 1, 29.

<sup>59</sup> *Robinson v. Green*, 3 Met. (Mass.) 159.

<sup>60</sup> *Foley v. Speir*, 100 N. Y. 552.

in which the valid and invalid parts are inseparable.<sup>61</sup> Thus a statute annulling grants of land held adversely by another, and one making their acceptance a misdemeanor, were held not to apply to the entire instrument containing the grant of such land, nor to invalidate the grant of other land in the same conveyance, but only to affect such portions thereof and such grants therein as were in violation of such statutes.<sup>62</sup>] On the same principle, a by-law which is partly good and partly bad is valid as to the former part, if the latter is distinct and separable from it (*a*); and orders of justices and of other authorities, and the awards of arbitrators are similarly treated (*b*).

§ 461. **Effect of Statute Rendering Performance of Contract Illegal, etc.**—Where a Statute compels a breach of a private contract, [*i. e.*, where its performance is rendered illegal by the enactment, the obligation is discharged,<sup>63</sup> and] the contract is impliedly repealed by the Act, so far as the latter extends,<sup>64</sup> or the breach is excused, or is considered as not falling within the contract (*c*). The intervention of the Legislature, in altering the situation of the contracting parties, is analogous to a convulsion of nature, against which they, no doubt, may provide; but if they have not provided, it is generally to be considered as excepted out of the contract (*d*). Thus, where

<sup>61</sup> *Towle v. Smith*, 2 Robt. (N. Y.) 489.

<sup>62</sup> *Towle v. Smith*, 2 Robt. (N. Y.) 489. A trust is not invalid if made to defeat the collateral inheritance tax; it is simply this intention that is to be frustrated: *Tritt v. Crotzer*, 13 Pa. St. 450.

(*a*) *R. v. Faversham*, 8 T. R. 352, 2 Kyd, Corp. 155; *R. v. Lundie*, 31 L. J. M. C. 157, *per* Quain, J., in *Hall v. Nixon*, 10 Q. B. 152; *per* Bayley, J., in *Clark v. Denton*, 1 B. & Ad. 95; *Brown v. Holyhead*, 1 H. & C. 601, 32 L. J. 25. [Laws organizing municipal governments being designed for the preservation of public order, contracts in violation of such laws are void: *Louisiana State B'k v. Nav. Co.*, 3 La. An. 294.]

(*b*) *R. v. Stoke Bliss*, 6 Q. B. 158; *R. v. Oxley*, Id. 250; *R. v. Robin-*

*son*, 17 Q. B. 466; *R. v. Green*, 2 L. M. & P. 130; *Re Goddard*, 1 L. M. & P. 25.

<sup>63</sup> *Brown v. Dillabuntz*, 12 Miss. 713; and see *Hampton v. Com'th*, 19 Pa. St. 329, *infra*.

<sup>64</sup> A law laying an embargo, even for an unlimited time, does not extend to the extinguishment of a contract with whose present performance it interferes, but operates only as a suspension of it until the law is repealed: *Baylies v. Fettyplace*, 7 Mass. 325.

(*c*) *Per cur.* in *Brewster v. Kitchell*, 1 Salk. 198.

(*d*) *Per* Pollock, C. B., in *Oswald v. Berwick*, 3 E. & B. 653, 23 L. J. 331. [In *Hampton v. Com'th*, 19 Pa. St. 329, proceedings had been taken under an act of assembly to open a street, the act providing for the assessment of damages sustained by property holders upon lots of

land was leased to certain persons, who covenanted to build a workhouse on it, and not to use the house or land for any other purpose than the support of the poor of the parish; and the Poor Law Commissioners, under the 4 & 5 Wm. 4, c. 76, incorporated the parish in a Union, and removed the paupers to the union workhouse, whereupon the house was shut up and the land was let at a rack rent, which was applied in aid of the rates; it was held that the covenant had not been broken, or that the breach was excused by legislative compulsion (*a*). [And so, where the right of bail for a defendant taken under a *capias ad satisfaciendum* to surrender the principal in discharge of his liability, is destroyed by statute, the bail is discharged.<sup>65</sup>]

§ 462. If a man covenants not to do a thing which was unlawful at the time of the covenant, and an Act subsequently makes it lawful only, but not imperative, to do it; the covenant is unaffected by the Act (*b*). [But if he agrees not to do a thing, which, at the time is lawful, and a subsequent statute compels him to do it, the agreement is repealed.<sup>66</sup> Thus] where a lessee covenanted, for himself and his "assigns," that he would not build on the demised premises;

others benefited and giving a proceeding for the enforcement. Before completion of this proceeding, the act was repealed. It was contended that the right of the property holders to the damages assessed could not be affected, being in the nature of contract rights. This was denied by the court: "But," says Black, C. J., "assume it to be a contract. Let it be supposed that the plaintiff in error covenanted to pay a certain sum in consideration of the additional value which would be given to his lots. If the street is not opened the consideration fails, and then what becomes of the contract? Equity will always relieve against a contract when an *unforeseen accident*, such as the interference of the Legislature, has rendered it impossible for both parties to perform it. It will scarcely be said that a contract, the execution of which is forbidden by equity and good conscience, is within the inhibition of the constitution. The

obligation of such a contract could not be impaired; for it has no obligation:" *ubi supra*, p. 334.]

(*a*) *Doe v. Rugeley*, 6 Q. B. 107. See *D. of Devonshire v. Barrow*, 2 Q. B. D. 286.

<sup>65</sup> *Brown v. Dillahunty*, 12 Miss. 713. In *Union Locks & Canals v. Towne*, 1 N. H. 44, it was held, that one who became a proprietor in a company was discharged from his contract and liability to subsequent assessments by a subsequent statute, passed upon petition of the corporation without his assent, authorizing it to hold a greater amount of real estate, the subscription being treated as a contract in which no valid change could be made without the assent of all the parties.

(*b*) *Per cur.* in *Brewster v. Kitchell*, 1 Salk. 198. [Brick Pres. Ch. v. New York, 5 Cow. (N. Y.) 538.]

<sup>66</sup> *Brick Pres. Ch. v. New York*, *supra*.

and he was afterwards compelled, under an Act of Parliament, to sell the land to a railway company, who built on it; it was held that the company was not an "assign" within the meaning of the covenant. The Legislature, it was considered, had, in compelling the sale, created a kind of assign not contemplated by either lessor or lessee when the contract was entered into; and so, the lessee could not justly be held responsible for the acts of such an assign. It was not reasonable to impute to the Legislature the intention that he should remain liable for the non-performance of that which it had, itself, prevented him from performing (a).

§ 463. **Statute Implies Means of Enforcement.**—When a statute creates a new obligation, or makes unlawful that which was lawful before, a corresponding right is thereby impliedly given, either to the public, or to the individual injured by the breach of the enactment; and sometimes to both. ["The general rule as to the way in which the authority of statutes may be enforced directly is, that whenever a statute orders a thing to be done, or forbids the doing of anything, an indictment lies for the omission of the one or the commission of the other, and an action also lies at the suit of any person who has sustained injury from such omission or commission."<sup>67</sup> "What the law says shall not be done it becomes illegal to do, and is therefore the subject-matter of an indictment without the addition of any corrupt motives."<sup>68</sup> "In every case where a statute prohibits anything and doth not limit a penalty, the party offending therein may be indicted as for a contempt against the statute."<sup>69</sup> "Whenever an Act of Parliament doth prohibit anything, the party grieved shall have an action, and the offender shall be punished at the King's suit."<sup>70</sup> "It is written on the horn-book of the law, that the public and a party particularly aggrieved, may

(a) *Baily v. De Crespigny*, L. R. 4 Q. B. 180. See, also, *Wadham v. P. M. Genl.*, L. R. 6 Q. B. 644; *Brown v. Mayor of London*, 9 C. B. N. S. 726, 30 L. J. 225; *Newington v. Cottingham*, 12 Ch. D. 725, 48 L. J. 226. [As to the effect of the repeal of a statute making

an act, etc., unlawful, see post, § 488.]

<sup>67</sup> *Wilb.*, Stat. L., pp. 69-70.

<sup>68</sup> *Ib.*, cit. *R. v. Sainsbury*, 4 T. R., at p. 457, *per* Ashhurst, J.

<sup>69</sup> *Cil. Crowther's Case*, Cro. Eliz., at p. 655.

<sup>70</sup> 2 Inst. 163



each have a distinct but concurrent remedy for an act which happens to be both a public and a private wrong."<sup>11</sup>]

§ 464. **Implied Remedies where Act Prohibits or Commands something Public.**—If a statute prohibits a matter of public grievance (*a*), or commands a matter of public convenience (*b*), all acts and omissions contrary to its injunctions are misdemeanors; and if it omits to provide any procedure or punishment for such act or default, the common law method of redress is impliedly given; that is, the procedure by indictment, and punishment by fine and imprisonment (*c*). But the matter must be strictly of public concern. If the statute extends only to particular persons, or to matters of a private nature, as those relating to distresses by lords on their tenants, disobedience would not be indictable (*d*). Where the burden of repairing a private road for the use of the owners and occupiers of tenelements in nine parishes, was thrown upon the owners and occupiers in six of those parishes; the latter were held not indictable for the non-repair of the road, because the duty did not concern the public, but only the individuals who had a right to use the private road (*e*). [But for neglect or refusal on the part of township supervisors to open or repair a public highway, a part of their official duty as public functionaries, an indictment will lie."<sup>12</sup>]

§ 465. **Statute Creating Obligation and Giving Remedy in Same Section.**—If the statute which creates the obligation, whether private or public, provides in the same section or passage a specific means or procedure for enforcing it, no other course than that thus provided can be resorted to for that pur-

<sup>11</sup> *Foster v. Com'th*, 8 Watts & S. 77, 79, *per* Gibson, C. J.

(*a*) *R. v. Sainsbury*, 4 T. R. 445.

(*b*) *R. v. Davis*, Say. 133; *R. v. Price*, 11 A. & E. 427.

(*c*) 2 Hawk. c. 25, s. 4; and see the cases collected in Burn's, J., Office II. [*Colburn v. Swett*, 1 Met. (Mass.) 232; *Elder v. Bemis*, 2 Id. 599; *Gearhart v. Dixon*, 1 Pa. St. 224; *State v. Fletcher*, 5 N. H. 257. So, where a statute makes an act "unlawful," but specifies no proceeding, its viola-

tion is punishable according to the course of the common law: *State v. Parker*, 91 N. C. 650.]

(*d*) 2 Hawk., *ubi supra*.

(*e*) *R. v. Richards*, 8 T. R. 634. See, also, *R. v. Storr*, 3 Burr. 1699, and *R. v. Atkins*, Id. 1706.

<sup>12</sup> *Graffins v. Com'th*, 3 Pen. & W. (Pa.) 503; *Edge v. Com'th*, 7 Pa. St. 275; *Phillips v. Com'th*, 44 Id. 197; *Com'th v. Reiter*, 78 Id. 161; *Oakland Tp. v. Martin*, 104 Id. 303. See post, § 467.

pose (a). Thus, where the land tax redemption Act directed that the tax should be added to the rent in all future bishops' leases, and should be recoverable in the same way as the rent, it was held not recoverable by any other means (b). A breach of the 5 & 6 Ed. 6, c. 25, which enacted that no person should keep an ale-house, but such who should be admitted thereunto and allowed in open sessions, or by two justices, under the penalty of summary commitment by justices for three days, was not subject to prosecution by indictment (c). The 21 Hen. 8, c. 13, having enacted that no spiritual person should take lands to farm, on pain of forfeiting ten pounds, it was held that an offender could not be indicted for a breach of this enactment, but could only be sued for the penalty (d). Where an Act which, requiring shareholders to pay calls on their shares, provided that in case of default the company might sue them in the courts in Dublin; it was held that an action would not lie in England (e).

§ 466. **Statute Creating Obligation to Pay Money.**—If the newly-created duty is simply an obligation to pay money for a public purpose, the general rule would seem to be that the payment cannot be enforced in any other manner than that provided by the Act; though the provision be not contained, as in the above cases, in the same section as that in which the duty was created. Thus, the 43 Eliz. c. 2, which authorizes, by the second section, the imposition of a poor-rate, and empowers the parochial officers, by the fourth, to levy the arrears from those who refuse to pay, by distress,

(a) [See post, § 467.] This does not apply to the equitable remedy by injunction. See, ex. gr. *Cooper v. Whittingham*, 15 Ch. D. 501; *Atty.-Genl. v. Basingstoke*, 45 L. J. Ch. 726. [See, also, *People v. Vanderbilt*, 24 How. Pr. (N. Y.) 301; and ante, §§ 151, 154. But comp. § 474. Where churchwardens refused to allow an inspection of their accounts, the Court would not refuse a mandamus to enforce the performance of that duty, if advisable on public grounds, only because a pecuniary penalty, applicable to the use of the poor of the parish, was imposed for the refusal:

*R. v. Clear*, 4 B. & C. 899. See, also, *Lichfield v. Simpson*, 8 Q. B. 65.

(b) *Doe v. Bridges*, 1 B. & Ad. 859. *Comp. Scotch Widows' Fund v. Craig*, 51 L. J. Ch. 363; and see *Cumming v. Bedborough*, 15 M. & W. 438.

(c) *R. v. Marriot*, 4 Mod. 144; *R. v. Buck*, 3 Stra. 679.

(d) 2 Hale, P. C., 171; *R. v. Wright*, 1 Burr. 544; and see *per cur.* in *Couch v. Steel*, 3 E. & B. 403.

(e) *Dundalk R. Co. v. Tapster*, 1 Q. B. 667.

limits the officers to this remedy, and gives no right of action for a poor-rate (*a*). Similarly, where highway rates were made payable under a statute which prescribed a particular procedure for their recovery, it was held that that method only could be pursued, and that no action lay (*b*). It is, however, a general rule, that where an Act of Parliament creates an obligation to pay money, the money may be recovered by action, unless some provision to the contrary is contained in the Act (*c*), that is, unless an exclusive remedy be given (*d*); and the question may arise whether the particular remedy given by the Act is cumulative or substitutional for this right of action. Where a harbor Act required the master of a ship to pay certain duties to the trustees of the harbor; and besides empowering the latter to distrain for them, enacted that any master who eluded payment should stand liable to the payment of them, and that they should be levied in the same manner as penalties were directed by the Act to be levied (that is, by action or distress); it was held that the latter remedy was cumulative, and that as the Act had made the master liable to pay the dues, an action lay for them (*e*). This decision is said to have been based on the ground that the particular remedy given by the Act did not cover the whole right (*f*), [thus falling within the rule that a common law remedy is not superseded by a statutory remedy covering only part of the right.<sup>13</sup> A familiar instance of the application of this principle is in the case of certain corporations whose charters require their members to pay certain periodical dues, and, in order to secure the performance of this duty, give the company a lien upon the defaulting member's stock, or authorize the imposition of fines and

(*a*) *Stevens v. Evans*, 2 Burr. 1152, *per* Denison, J.

(*b*) *Underhill v. Ellicombe*, McClel. & Yo. 450. See, also, *London & Brighton R. Co. v. Watson*, 4 C. P. D. 118; and *sup.* §§ 151, et seq.

(*c*) *Per* Parke, B., in *Shepherd v. Hills*, 11 Ex. 55, 25 L. J. 6. See *ex. gr.* *Stemson v. Heath*, 3 Lev. 400; *Pelham v. Pickersgill*, 1 T. R. 661; *Maurice v. Marsden*, 19 L. J. C. P. 152; *Bult v. Price*, 1

Q. B. D. 264.

(*d*) *Per* Martin, B., in *Hutchinson v. Gillespie*, 25 L. J. Ex. 109; *R. v. Hull & Selby R. Co.*, 6 Q. B. 70.

(*e*) *Shepherd v. Hills*, *ubi sup.*

(*f*) *Per* Williams, J., in *St. Pancras v. Batterbury*, 2 C. B. N. S. 477, 26 L. J. M. C. 246.

<sup>13</sup> *Gibbes v. Beaufort*, 20 S. C. 213. See, also, *Salem Turnp., etc., Co. v. Hayes*, 5 Cush. (Mass.) 458.

forfeitures, or both. In such case, a common law action lies for the recovery of the dues by the association whenever they become payable ;<sup>74</sup> for a penalty which has for its end the insurance of the performance of the principal obligation, does not destroy the latter.<sup>75</sup> So, where the act incorporating a company, the subscribers to whose stock signed an agreement to pay a certain amount per share as the same should be called for, authorized the managers to call for payments, and inflicted a penalty of five per cent. per month upon defaulters, with the additional provision, that, when the penalty should amount to the sums paid in, the share should be forfeited to the company, it was held that the latter might waive the forfeiture and proceed upon the personal obligation assumed by the subscriber to the agreement referred to.<sup>76</sup> Again, where an act provided that the stockholders of certain corporations should be liable, in their individual capacities, to the amount of the stock held by each, for all work or labor done to carry on the operations of the company, it was held, that, whilst this individual liability, being of a purely statutory character and having no existence outside of the legislation, must be enforced, whenever invoked, in the precise manner prescribed by the statute,<sup>77</sup> it was not the sole liability which the creditors of an insolvent corporation might enforce for the satisfaction of their claims ; that they might also, by appropriate process, enforce for their benefit the liability existing on the part of the stockholders to the corporation to pay uncalled and unpaid subscriptions to capital stock ; and that, consequently, a bill in equity would lie at the instance of creditors of such a corporation to collect such part of the unpaid and uncalled subscriptions as was necessary for the satisfaction of their

<sup>74</sup> See *Build'g Ass'n v. Kribs*, 7 Leg. & Ins. Rep. (Pa.) 21 ; *Morrison, Receiver, etc. v. Dorsey*, 48 Md. 461.

<sup>75</sup> *D. & S. Canal Nav. Co. v. Sansom*, 1 Binn. (Pa.) 69.

<sup>76</sup> *Ibid.* ; and see, as recognizing this principle : *Palmer v. Mining Co.*, 84 Pa. St. 288 ; *Merrimac Min'g Co. v. Levy*, 54 Id. 227 ;

*Franks Oil Co. v. McCleary*, 68 Id. 317 ; *Messersmith v. Bank*, 96 Id. 440 ; *Hartford, etc., R. R. Co. v. Kennedy*, 12 Conn. 499 ; *Carson v. Min'g Co.*, 5 Mich. 288.

<sup>77</sup> *Patterson v. Lane*, 35 Pa. St. 275 ; *Hoard v. Wilcox*, 47 Id. 51 ; *Youghiogheny Shaft Co. v. Evans*, 72 Id. 331 ; *Means App.*, 85 Id. 75 ; ante, § 351.

claims.<sup>76</sup>] But where a by-law required a traveler without a ticket to pay the fare from the station whence the train first started to the end of his journey, and, by 8 Vict. c. 20, sect. 145, penalties or forfeitures imposed by the by-laws were recoverable before justices; it was held that the by-law did not create a debt recoverable in a Court of civil jurisdiction (*a*). [And where a statute against usury, besides empowering the debtor to make certain deductions on account of the usury paid by him, gave him an action of debt against the creditor, and imposed upon the latter the liability to pay a sum equal to three times the amount of the usury paid, it was held that a party who had paid usury could not recover the excess over the legal percentage in an action of assumpsit for money had and received, but that the remedy was exclusively under the statute.<sup>79</sup>]

§ 467. **Statute Creating Public Duty and Giving Remedy, in Different Sections.**—If the statute creates the public duty in one section, and provides a procedure for the enforcement of it, or the punishment for its breach, in a separate section,<sup>80</sup> or if the duty to which the new procedure applies, already existed before the Act (*b*), the offence is usually subject to the common law procedure and punishment, as well as to the special procedure so given. Thus, under the 10 & 11 Wm. 3, c. 17, which declared, in the first section, that keeping a lottery was a public nuisance, and, by the second, made the keeper of one liable to a penalty recoverable by penal action, it was held that the offender was also indictable (*c*). The 6 & 7 Vict. c. 73 having enacted, in one section, that no person should act as an attorney who was not duly admitted and enrolled; and in another, that a breach of this prohibition should be deemed a contempt of Court; it was held that the offence was also indictable (*d*). [So, where an act by its 90th section imposed upon the supervisors of townships all the duties imposed by law on the supervisors of public highways, and declared them subject to the same

<sup>76</sup> Lane's App., 105 Pa. St. 49.

(*a*) London & Brighton R. Co. v. Watson, 4 C. P. D. 118.

<sup>79</sup> Crosby v. Bennett, 7 Met (Mass.) 17.

<sup>80</sup> See ante, § 465.

(*b*) See sup. §§ 235, 236. R. v. Davis, Say. 163; R. v. Gould, 1 Salk. 381.

(*c*) R. v. Crawshaw, Bell, 303, 30 L. J. M. C. 58.

(*d*) R. v. Buchanan, 8 Q. B. 883.

responsibilities, and by its 92nd section provided, that, if any supervisor should neglect to perform any duty required of him by law, he should forfeit a certain sum to be recovered summarily by action of debt in the name of the commonwealth, it was held that an indictment lay for a refusal or neglect to repair.<sup>81</sup>] So, where a statute prohibited the erection or maintenance of a building within ten feet of a road, declaring such an erection a common nuisance; and, in another section, authorized two justices to convict the proprietor, and to remove the structure; it was held that an indictment, also, lay for the nuisance (a).

§ 468. **Same Rule as to Private Duties.**—The same principle applies when the duty is a private one. Thus, the 11 Geo. 2, c. 19, which, after authorizing landlords, by section 1, to seize the goods of their tenants, when fraudulently and clandestinely removed to elude a distress, gives them, by section 4, a summary remedy before justices, for recovering double the value of the goods removed, against the tenant, or any person who assisted him, was held to give them also, by implication, the right of suing for damages for the fraudulent or clandestine removal (b). [But, where the first section of an act punished larceny by fine, etc., the third gave the owner of the goods the right to treble the value of the goods at the hands of the offender, and in case of his inability to pay, authorized the court to sentence him to make satisfaction by service to the owner, who might thereupon sell him in service; and the tenth section provided, that, unless the owner do so in thirty days, or give the gaoler security to pay the charges of keeping the prisoner, the gaoler might set him at liberty, it was held, that, in such case, the owner had no remedy by action of debt

<sup>81</sup> *Edge v. Com'th*, 7 Pa. St. 275. It is proper to observe, however, that, in the decision, the ninety-second section was held to refer more particularly to failure to perform the other duties imposed by the act, those of overseers of the poor, and to be designed for the benefit of individuals. As to liability of supervisors to indictment, see ante, § 464.

(a) *R. v. Gregory*, 5 B. & Ad.

535. [See, to similar effect, *Renwick v. Morris*, 3 Hill (N. Y.) 621; 7 Id. 575.]

(b) *Bromley v. Holden*, Moo. & M. 175; *Horsfall v. Davy*, 1 Stark. 169; *Stanley v. Wharton*, 9 Pri. 301, 10 Pri. 138. See, also, *Collinson v. Newcastle R. Co.*, 1 C. & K. 546; *Ross v. Price*, 1 Ex. D. 269, 45 L. J. Ex. 777; and the cases collected in the note to *Ashby v. White*, 1 Sm. L. C. \*342.

against the offender after being so set free.” And in this connection may be cited the rule, that, where a statute creates a right and limits the time for bringing an action upon it, if the limitation is suffered to expire without any action, the right itself is gone, and cannot be revived by being claimed in another proceeding. Thus, where an act authorized an unlucky gambler to recover back the money lost by him, if suit be brought in ten days, it being expressly provided that the suit shall be founded on the act and the recovery be according to the form of the act, thus showing that it did not proceed upon the principle of compensating an injured party in damages, if the time be allowed to slip by, the right given by the act was gone entirely and could not be asserted, *e. g.*, upon distribution of the proceeds of a forfeited bond which had been given by the keeper of the gambling house for appearance in court, upon being prosecuted.<sup>83</sup>

§ 469. **Where Third Parties Interested in Duties or Prohibitions.**—When a statute, for the benefit of particular individuals, imposes a ministerial, as distinguished from a judicial duty, [or prohibits the doing of a thing,] any of those individuals, if directly injured by the breach of the duty [or prohibition,] has impliedly a right to recover, from the person on whom the duty is cast [or the prohibition imposed,] satisfaction for the injury done to him contrary to the statute (*a*), unless, of course, a different intention is to be collected from the Act; [and if the statute points out no specific remedy, a remedy may be drawn from the common law.<sup>84</sup> Thus, where a statute imposes upon house-owners the absolute duty of providing fire-escapes, any person damnified by a non-performance thereof may maintain an action therefor.<sup>85</sup>] An incorporated vestry which refused to perform the statutory duty of removing dirt and ashes, was held liable in an action by the party aggrieved, for the expenses incurred from the refusal (*b*). So, an unsuccessful candidate at an election is

<sup>83</sup> *Smith v. Drew*, 5 Mass. 514.

<sup>84</sup> *Com'th v. Robbins*, 26 Pa. St. 165.

(*a*) 2 Westmr. 13 Ed. c. 50; 1 Inst. 56a; Anon., 6 Mod. 27; *per cur.* in *Couch v. Steel*, 3 E. & B.

411. [*Van Hook v. Whitlock*, 2 Edw. (N. Y.) 304.]

<sup>85</sup> *Kneass v. Bank*, 4 Wash. 106.

<sup>85</sup> *Willy v. Mulledy*, 78 N. Y. 310.

(*b*) *Holborn Union v. St. Leonard's*, 2 Q. B. D. 145.

entitled to sue the returning officer for compensation, if the loss of the election was owing to the officer's neglect of the prescriptions of the Ballot Act (a). An action was held maintainable by the party wronged against a deputy post-master, for not delivering a letter according to his duty under the 9 Anne, c. 10; though he was also liable, under the same Act, to a penalty for detaining letters, recoverable by a common informer (b). Under the 8 Anne, c. 19, which gave authors the sole right of printing their works for fourteen years, and provided that if any other person printed them without consent, he should forfeit the printed matter to the proprietor, and a further penny for every sheet, one half to the Queen, and the other half to the informer, the author was entitled to sue also for damages (c). If a railway company were prohibited, for the protection of the owner of one ferry, from making a line to another ferry, an action would lie for breach of the prohibition, without special damage (d). The Companies Act, 1867, sect. 38, which, after requiring that every prospectus and notice of a joint-stock company, inviting persons to subscribe for shares, shall specify the dates and names of the parties to contracts entered into by the company or its promoters before the issue of the prospectus or notice, declares that every prospectus which does not comply with this provision shall be deemed fraudulent on the part of those who knowingly issued it, as regards those who take shares on the faith of such prospectus, and in ignorance of the unmentioned contract, was held to give by implication to such shareholders a cause of action against every such issuer of the prospectus (e). [It is immaterial, as affecting the right of the individual to sue in such cases, that the dereliction is also punishable criminally. Thus, it is said that every breach of duty by a public officer, whereby an individual is specially injured will subject the former to

(a) 35 & 36 Vict. c. 33; *Pickering v. James*, L. R. 8 C. P. 489. See, also, *Fotherby v. Metrop. R. Co.*, L. R. 2 C. P. 188.

(b) *Rowning v. Goodchild*, 2 W. Bl. 906.

(c) *Bedford v. Hood*, 7 T. R. 620. See *Novello v. Sudlow*, 12 C. B. 177.

(d) *Chamberlaine v. Chester R. Co.*, 1 Ex. 870.

(e) *Charlton v. Hay*, Q. B. M. T. 1874, 31 Law Times, 437. See *Gover's Case*, 1 Ch. D. 182, *per James, L. J.*, and *Bramwell, L. J.* <sup>80</sup> *Work v. Hoofnagle*, 1 Yeates (Pa.) 506.



an action for damages." So, too, "a person beaten may prosecute an action for the battery, while the commonwealth prosecutes an indictment for the breach of the peace; or a nuisance may be visited by indictment as a public wrong, while it is visited by an action as a private injury; and for reasons equally good, a libeller may be punished as a disturber of the peace, while he is made to respond in damages by the person libelled, as a defamer of h's character."<sup>87</sup> So, where a statute prohibited, under penalties, certain injuries to a road, as breaking down the gates, or digging up earth, it was held not to bar a common law action for such injury or obstruction.<sup>88</sup>]

§ 470. **Non-Performance of New Duty, etc. Penalty Recoverable by Aggrieved Party.**—If, indeed, the non-performance of the new duty [or, as the injunction to refrain from doing what was before lawful, is equivalent to the imposition of a new duty, the commission of a new offence,] is made by the Act subject to a pecuniary penalty, recoverable only by the party aggrieved, the inference would seem to be that this penalty was intended as a compensation for the private injury, as well as a punishment for the public wrong; and there would be no other remedy for either the one or the other (*a*). Thus, where an Act provided that if one fishing boat interfered with another under certain circumstances, the party interfering should forfeit a penalty to the party interfered with, recoverable summarily before justices, to whom powers were given of enforcing their decisions by distress and imprisonment; it was held that no action for special damage was maintainable, but that the party injured was limited to the remedy given by the statute (*b*). It has

<sup>87</sup> *Foster v. Com'th*, 8 Watts & S. (Pa.) 77, 79. See ante, § 463.

<sup>88</sup> *Salem Turnp., etc., Co. v. Hayes*, 5 Cush. (Mass.) 458. But this was partly upon the ground that the penalties inflicted were entirely inadequate as a compensation. Comp. ante, § 466. The Ky. Gen. Stat's, 21, 24, provide that any person injured by the violation of a statute may recover from the offender such damages as he may have sustained thereby,

although a penalty or forfeiture be provided by statute: *Stimson*, Amer. Stat., p. 143, § 1046.

(*a*) *Per cur.* in *Couch v. Steel*, 3 E. & B. 402. See *Partridge v. Naylor*, Cro. Eliz. 480, sup. § 256; *R. v. Hicks*, 4 E. & B. 633, 24 L. J. M. C. 94.

(*b*) *Stevens v. Jeacocke*, 11 Q. B. 731. [It is said, *Sedgwick*, p. 76, and see *Barden v. Crocker*, 10 Pick. (Mass.) 383, that, where a statute does not vest a right in a

been observed, indeed, respecting this case, that no duty was imposed on the defendant by the Act ; that he was only prohibited, under a penalty, from exercising the right of fishing to the extent that he had it at common law ; that he was not bound to perform any particular duty created by the Act, but only to forbear to do that which, but for the Act, he might have done (*a*). But it may be doubted whether the suggested distinction is substantial. If an Act prohibited, for the protection of particular persons, a railway company from making a line in a certain direction, the company would seem liable to an action by those persons for damages sustained from a breach of the enactment (*b*). At all events, the only duty created, if any, was one to the party injured ; and as the Act, in expressly creating that duty, also provided a special remedy for its breach, none other was to be implied. [Possibly, the distinction properly to be drawn is this, that, where a statute gives a remedy, without a negative expressed or implied, for a matter which was actionable at common law, the party aggrieved may sue at common law or upon the statute ; but, where the act gives a new right, one that did not exist before, *e. g.*, the exclusive enjoyment of a ferry, and prescribes a remedy for its infraction, that remedy and no other must be pursued.<sup>99</sup> This principle was applied to a case arising under an act "to establish an independent treasury of the State of Ohio," one section of which made any person advising, aiding, or participating in, the loaning of public money, with the public officer who made such loan, guilty of embezzlement, and, on conviction, subject to imprisonment and to a fine in double the amount embezzled, the fine being given the effect of a judgment in favor of the county, etc., whose funds were so embezzled, collectible like other judgments, and capable of being released only by such party. It was

person, but merely prohibits the doing of some act under a penalty, the party violating the statute is liable to the penalty only ; but where a right of property is vested in consequence of the statute, it may be vindicated by the common law remedy of action, unless the statute expressly confines the

remedy to the penalty. But see cases *infra*.]

(*a*) *Per cur.* in *Couch v. Steel*, 8 E. & B. 413.

(*b*) See *Chamberlaine v. Chester R. Co.*, 1 Ex. 870.

<sup>99</sup> *Almy v. Harris*, 5 Johns. (N. Y.) 175.

held, that, as the offence was a new one ; as the right created in favor of the party injured as against persons advising, etc., the misapplication of the public funds was a new one, not previously existing at common law ; as the recognition of a right of civil action against such persons, in addition to the statutory remedy, would, in effect, be giving the injured party treble damages, the statutory remedy must be deemed exclusive of any civil action based upon the same offence." ]

§ 471. **Right of Action Limited to Those Directly within Gist of Enactment.**—The right of action, where it exists, is strictly limited to those who are directly and immediately within the gist of the enactment ; [*i. e.*, the violation of a duty imposed by statute for the benefit or protection of a particular class of persons, cannot be made the foundation of an action by any not belonging to that class." ] The Contagious Diseases Animals Act, for example, in imposing a penalty on those who send animals to market with infectious diseases, may give a right of action to the owner of an animal in the market, which caught the disease from the infected animal of the offender, the object of the Act being to protect those who expose animals for sale there ; but it would not give a right of action to the purchaser of the diseased animals which had been wrongfully exposed, for the Act did not aim at the protection of buyers in the market (*a*). So, an Act which requires a railway company to fence their line, may give the adjoining landowner an action for a breach of the enactment, if his cattle are injured by getting on the line in consequence ; but a passenger injured by an accident caused by such cattle getting on the line, would not be entitled to

<sup>90</sup> *Hancock Co. v. Bank*, 32 Ohio St. 194, citing *R. v. Robinson*, 2 Burr., at p. 803 ; *Livingstone v. Van Ingen*, 9 Johns. (N. Y.) 507 ; *Almy v. Harris*, *supra* ; *Andover v. Gould*, 6 Mass. 41 ; *Bissel v. Larned*, 16 Id. 65 ; *Camden v. Allen*, 26 N. J. L. 398 ; *Shepard v. Comm'rs*, 8 Ohio St. 354 ; *State v. Comm'rs*, 26 Id. 369 ; *Lang v. Scott*, 1 Blackf. (Ind.) 405 ; *Victory v. Fitzpatrick*, 9 Ind. 283.

<sup>91</sup> *Jersey City Gaslight Co. v. Consumers' Gas Co.*, 40 N. J. l'q. 427. See, also, as to liability of a telegraph company under a statute, whether to sender alone or other person also : *West. Un. Tel. Co. v. Pendleton*, 95 Ind. 12 ; (*Same*) *v. Reed*, 96 Id. 195 ; (*Same*) *v. Kinney*, 106 Id. 468 ; (*Same*) *v. Steele*, 108 Id. 163.

(*a*) *Ward v. Hobbs*, 3 Q. B. D. 150, 4 App. 13.

an action for the neglect to fence (a). [Nor can the violation by a gas company of a charter requisition, under a penalty, as to the illuminating power and purity of the gas permitted to be furnished by it, be made the ground of an application by a rival gas company for an injunction depriving the former of the right to exercise its franchise.<sup>22</sup>]

§ 472. **Former Latitude in this Respect. Later Rule.**—The general principle was formerly considered of wider application; for it was deemed that whenever a statutory duty was created, any person who could show that he had sustained an injury from the non-performance of it, had a right of action for damages against the person on whom the duty was imposed. Accordingly, where an Act required the owner of a ship to keep on board a sufficient supply of medicines, under a penalty of 20*l.*, recoverable at the suit of any person, and divisible between him and the Seamen's Hospital, it was held that the owner was liable also to an action by a seaman, for compensation for the special damage which he had sustained from a neglect to supply the ship with medicines, as required by the Act (b). But this proposition cannot be now regarded as law. Whether any such right of action arises by implication must depend on the purview of the Act (c).

Where it was enacted that a water-works company should (1) fix and maintain fireplugs; (2) furnish water for baths, wash-houses, and sewers; (3) keep the pipes always charged at a certain pressure, allowing all persons to use the water for extinguishing fires, without compensation; and (4) supply the owners and occupiers of houses with water for domestic

(a) *Buxton v. N. E. R. Co.*, L. R. 3 Q. B. 549.

<sup>22</sup> *Jersey City Gaslight Co. v. Consumers' Gas Co.*, *supra*. So, where an act gave a writ of quo warranto at the instance of a private relator, "upon the suggestion of any person or persons desiring to prosecute the same," it was held that the phrase must be restricted so as to mean any person having an interest to be affected, and to give to a private relator no right to the writ in a case of public right, involving no individual

grievance: *Com'th v. Cluley*, 56 Pa. St. 270; *e. g.*, to a defeated candidate for an office, to question the right of the incumbent: *Ib.*; or to a dismissed police constable of a municipality, to question the right of the mayor to his office: *Com'th v. McCarter*, 98 Id. 607.

(b) *Couch v. Steel*, 3 E. & B. 402, 23 L. J. 121; *Holmes v. Clarke*, 80 L. J. Ex. 135.

(c) See *Atkinson v. Newcastle Water-works Co.*, 2 Ex. D. 440, 448, *per* Lord Cairns, Cockburn, C. J., and Brett, L. J.

purposes; subject to a penalty of 10*l.* for any breach of any of those duties, recoverable by the common informer, and to a further penalty of forty shillings a day for breaches of the second and fourth duties, recoverable by any ratepayer; it was held that the owner of a house burnt down through the company's neglect to keep their pipes duly charged, had no right of action under the statute against the company. It was improbable that Parliament would impose, or the company would have consented to undertake, not only the duty of supplying gratuitously water for extinguishing fires, but the liability of compensating every householder injured, as well as of paying the penalties attached to the neglect of their duty. Besides, the circumstance that penalties for breach of the second and fourth duties were recoverable by the ratepayers, raised the inference that the other obligations were intended for the public benefit only (*a*).

§ 473. **Special Injury by Breach of Public Duty Necessary for Action. Remoteness.**—At all events, where the public duty imposed by the Act is not intended for the benefit of any particular class of persons, but for that of the public generally, no right of action accrues by implication to any person who suffers no more injury from its breach than the rest of the public. A public injury is indictable; but it is not actionable, unless the sufferer from its breach has sustained some direct and substantial private and particular damage beyond that suffered in common with the rest of the public (*b*). If A. digs a trench across the highway, he is indictable only; but if B. falls into it, A. is liable to an action by B. for the particular injury sustained (*c*). [A person may sustain an action for the obstruction of a highway, where he has suffered special damage by reason of it, as where he has been obliged to be at expense in removing the obstruction, in order to be able to travel the road;<sup>98</sup> but he can have no action for a total obstruction of the road by snow, whereby,

(*a*) *Atkinson v. Newcastle Waterworks Co.*, ubi sup.

(*b*) *Iveson v. Moore*, 1 Salk. 15; *R. v. Russell*, 6 East, 427; *R. v. Bristol Dock Co.*, 12 East, 428; *per Cur.* in *Chamberlaine v. Chester*,

&c., *R. Co.*, 1 Ex. 876; *Glossop v. Heston*, 12 Ch. D. 102.

(*c*) See notes to *Ashby v. White*, 1 Sm. L. C. \*342.

<sup>98</sup> *Lansing v. Wiswall*, 5 Denio (N. Y.) 213.

in common with the public, he has been prevented from using it."'] The obstruction of a navigable river becomes a private injury as well as a public nuisance, if access is thereby prevented to the inn of the plaintiff, who loses customers in consequence (*a*); or if a carrier is thereby put to the trouble and expense of conveying his goods by a road overland (*b*). When the public duty of repairing a sea-wall was imposed on a municipal corporation, it was held that an individual whose house was damaged by the sea, in consequence of the neglect of this duty to keep the wall in repair, was entitled to sue the corporation for compensation (*c*). But the injury must be the proximate, necessary, or natural result of the infringement of the duty; the infringement being the *causa causans*, and not merely a *causa sine qua non*, of the special damage (*d*). [And this applies even where a statute, relating to the punishing of an offence, contemplates the redress of injuries caused by them to individuals, as, where it directs that the proceeds of forfeited bonds given by persons prosecuted for crimes, conditioned for their appearance in court to stand trial, shall be distributed, *inter alia*, "to satisfy the damages sustained by any person by reason of the commission of such crime." Under such a statute, it was held that one who had lost money at play in the house of a person who was prosecuted for keeping a gambling house and forfeited his recognizance, was not entitled to be re-imbursed out of the proceeds thereof, not only because he had lost the statutory remedy given him to obtain such re-imbursement from the offender," but also because his misfortune was not the necessary or natural direct consequence of the misdemeanor for which the defendant was prosecuted. The latter's offence was but the *causa*

<sup>94</sup> *Griffin v. Sanbornton*, 44 N. H. 246.

(*a*) *Rose v. Groves*, 5 M. & G. 613; *Wilkes v. Hungerford Market Co.*, 2 Bing. N. C. 281; *Lyon v. Fishmongers' Co.*, 1 App. 662; *Marshall v. Ulleswater Co.*, L. R. 7 Q. B. 166, *per* Blackburn, J.

(*b*) *Rose v. Miles*, 4 M. & S. 101; *Dobson v. Blackmore*, 9 Q. B. 991; *Dobsons v. Bethnal Green*, 3 C. P.

56.

(*c*) *Lyme Regis v. Henley*, 1 Bing. N. C. 222. See *Nitrophosphate Co. v. St. Katherine Dock Co.*, 9 Ch. D. 503.

(*d*) *Benjamin v. Storr*, L. R. 9 C. P. 400; *Colchester v. Brooke*, 7 Q. B. 339; *Walker v. Goe*, 3 H. & N. 395, 4 Id. 351; *Romney Marsh v. Trinity House*, L. R. 5 Ex. 204.

<sup>95</sup> See ante, § 468.

causarum ; the loser's own voluntary act or folly, the causa causans, and volenti non fit injuria.<sup>99</sup>]

§ 474. **Statutes Foreign to Individual Interests Give no Private Action.**—Nor does any right of action arise where the duty has been imposed by the Legislature for a purpose altogether foreign to individual interests. Thus, although ship-owners are required, under the Contagious Diseases (Animals) Act of 1869, to provide pens and footholds for cattle on board, no action lies against them under the Act by the owners of cattle which are washed overboard, owing solely to the neglect to provide those appliances ; for the Legislature, in providing or authorizing such regulations, did not contemplate the protection of proprietary rights, but had in view solely the sanitary purpose of preventing the communication of infectious disease to cattle on sea transit (*a*). Where a person imported cards contrary to the statute 3 Edw. 4, c. 4, which provided that the cards so imported should be forfeited ; it was held that he was not liable to an action at the suit of one to whom the king had granted a license to import cards, paying rent to the king, and who alleged that he was thereby disabled from paying his rent ; for the prohibition did not seem to have been intended for the benefit of the person to whom the license was granted. But besides, the damage may have been considered too remote (*b*). [The accepted doctrine upon this subject is well illustrated by the following case and decision. An act forbade prison authorities to permit a convict to work at any other mechanical trade than that in which he had been educated before conviction ; made the violation of this prohibition a misdemeanor punishable by a fine of \$1,000 and imprisonment for one year ; and declared it to be the duty of the attorney-general to cause the offender to be prosecuted, upon information and complaint made to that officer. It was held that no injunction could be obtained, or compensation claimed, at the suit of private workmen alleging injury to themselves, by reason of

<sup>99</sup> Com'th v. Robbins, 26 Pa. St. 165.

(*a*) 32 & 33 Vict. c. 70 ; Gorris v. Scott, L. R. 9 Ex. 125.

(*b*) Roll. Ab. Action sur case, M. 16, p. 106, cited in the judgment in Couch v. Steel, 3 E. & B. 413, 23 L. J. Q. B. 126.

a violation of the statute, the injury consisting in the lowering of wages and in seriously affecting the interests of the plaintiffs and others pursuing the same trade, by the unlawful competition thus raised up in the same. It was said that a public prohibitory statute, though passed chiefly for the protection of a class, still does not confer any individual rights. Its infraction is a wrong to the public, for which the people, in their collective capacity, are entitled to redress,—not, however, an individual, unless he has sustained a special injury not in common with others. If, however, the injury is to a class, it is general, or common and not special.”]

” *Smith v. Lockwood*, 18 Barb. (N. Y.) 209.



## CHAPTER XVII.

## REPEAL. COMMENCEMENT. JUDICIAL NOTICE.

- § 475. Effect of Repeal of Repealing Act on Original.
- § 478. Effect of Repeal on Pending Proceedings. Prosecutions.
- § 479. Effect, etc., on Actions of Penal Nature, or where Jurisdiction depends on Statute Repealed.
- § 480. Effect, etc., on Rights and Remedies founded Solely on Statute.
- § 482. Limits of this Doctrine.
- § 484. Effect of Savings in Penal Acts.
- § 485. Effect of Savings of Civil Rights and Procedure.
- § 486. What not within Saving of Existing Rights, etc.
- § 487. Saving of Prosecutions and Rights not a Saving of Procedure.
- § 488. Effect of Repeal on Contracts in Violation of Statute Repealed.
- § 489. Time when Repeal takes Effect.
- § 490. Re-enactment not a Repeal in Spite of Express Repealing Clause.
- § 491. Limits of this Rule.
- § 492. Effect of Repeal of Act Incorporated by Reference in Another.
- § 494. Non-user has not Effect of Repeal.
- § 495. Qualification of this Rule.
- § 496. Commencement of Statutes. Ancient Rule.
- § 498. Modern Rule. Fractions of Day.
- § 499. Postponement of Operation.
- § 500. Repugnant Acts Passed Same Day.
- § 501. What Acts are Judicially Noticed.
- § 502. What are Public Acts.
- § 503. What are Private Acts.
- § 504. Private Acts Requiring Judicial Notice.
- § 505. Construction of Private as Compared with Public Acts.

§ 475. **Effect of Repeal of Repealing Act on Original.**—Where an Act is repealed, and the repealing enactment is repealed by another, which manifests no intention that the first shall continue repealed, the common law rule was, [and in the absence of any statutory declaration to the contrary, the general rule still is,] that the repeal of the second Act revives the first;<sup>1</sup> and revives it, too, ab initio, and not merely

<sup>1</sup> *Brown v. Barry*, 3 Dall. 365; *People v. Davis*, 61 Barb. (N. Y.) 456; *Gale v. Mead*, 4 Hill. (N. Y.) 259; *Janes v. Buzzard*, Hempst. 259.

from the passing of the reviving Act (a). [The revival of the original statute is also, in general, the effect of the expiration of a repealing statute by its own limitation,\* or of the suspension of the repealing act;† and it is immaterial whether the repeal of the repealing act be express or by implication.‡ Moreover, it extends, not only to statutes, but to the common law; so that, where an act superseding in any particular the common law rule previously applicable is repealed, that rule is held to be revived.§ The doctrine stated is, however, not without exceptions, founded in the necessity of giving effect to the legislative intent. Thus, it is said that an absolute affirmative repeal of a statute by a subsequent one will survive the expiration of the latter by its own limitation;¶ that the repeal of a statute which was a revision of, and which was intended as a substitute for, a former act to the same effect, will not revive the latter, such a result being manifestly contrary to the intent of the Legislature;‡ and that, for the same reason, the repeal of an act amending another “so as

109; *Hastings v. Aiken*, 1 Gray, (Mass.) 163; *Com'th v. Churchill*, 2 Met. (Mass.) 118; *Com'th v. Mott*, 21 Pick. (Mass.) 492; *James v. Dubois*, 16 N. J. L. 285; *Poor Directors v. R. R. Co.*, 7 Watts & S. (Pa.) 236; *Exp. Doran*, 2 Pars. (Pa.) 467; *Zimmerman v. Turnp. Co.*, 32 P. F. Sm. (81\* Pa. St.) 96; *Doe v. Naylor*, 2 Blackf. (Ind.) 32; *Teter v. Clayton*, 71 Id. 237; *Brinkley v. Swicegood*, 65 N. C. 626; *Harrison v. Walker*, 1 Ga. 32; *People v. Wintermute*, 1 Dak. 63. In *Durr v. Com'th* (Pa.), 11 Centr. Rep. 181, it was held that the act of 13 May, 1887, which contains a general repeal of “all local laws fixing a license rate less than” that provided by that act, repealed the act of 3 Apr., 1872, applying only to Allegheny Co., and revived those provisions of the general act of 26 Feb., 1855, which were not inconsistent with the act of 1887; the act of 1855 having been repealed by that of 1872 as to said county.

(a) 2 Inst. 686; 4 Inst. 325; *Case of Bishops*, 12 Rep. 7; *Phillips v. Hopwood*, 10 B. & C. 39; *Tattle*

*v. Grimwood*, 3 Bing. 496, *per* Best, C. J.; *Fuller v. Redman*, 26 Beav. 600, 29 L. J. 324. [The *Aurora v. U. S.*, 7 Cranch, 382. See, as to the effect of the repeal of a statute repealing another upon the right to prosecute for an offence against the latter: *Com'th v. Getchell*, and *Com'th v. Mott*, ante, § 279.]

‡ *Collins v. Smith*, 6 Whart. (Pa.) 294. See *U. S. v. 25 Cases of Cloth, Crabbe*, 356, *infra*.

§ *Brown v. Barry*, 3 Dal. 365.

¶ *People v. Davis*, 61 Barb. (N. Y.) 456.

‡ *Matthewson v. Phoenix, etc., Foundry*, 20 Fed. Rep. 281; *State v. Rollins*, 8 N. H. 550; *Bish., Wr. L.*, § 186; and see *Gray v. Obeur*, 54 Ga. 231.

§ *U. S. v. 25 Cases of Cloth, Crabbe*, 356.

‡ *Butler v. Russel*, 3 Cliff. 251. After an act has, in several different years, been re-enacted with changes, a subsequent repeal of the earlier amendatory acts neither restores nor repeals the original act: *People v. Assessors of Brooklyn*, 8 Abb. Pr. N. S. (N. Y.) 150.

to read" in a given manner, which operates as a total merger of the amended act in the amending one," cannot revive the original statute.\* And it has been denied, that the repeal of a statute revives the common law rule which it supplanted.<sup>10</sup> Nor does it follow from the rule that an act is revived *ab initio*, that proceedings commenced under an act which was repealed before their completion, are revived and reinstated by the repeal of the repealing act, there being no terms in the latter ratifying, confirming or reviving them, and no private interests having vested under them.<sup>11</sup> Nor, again, does the revival of an act providing that the penalty for an offence shall be sued for by a common informer, by the repeal of the act authorizing overseers only to sue, so far as it excluded others from so doing, restore the right of a common informer to prosecute for offences committed between the passage of the second and that of the third act, the right of the overseers to sue remaining exclusive as to such.<sup>12</sup>

§ 476. But the rule of the common law, in this respect, does not apply in England to repealing Acts passed since 1850. Where an Act repealing, in whole or in part, a former Act, is itself repealed, the last repeal does not now revive the Act or provisions before repealed, unless words be added reviving them (*a*). [Similar enactments are in force in many of the states of the Union ;<sup>13</sup> and the rule established

\* See ante, §§ 195-196, 294.

<sup>9</sup> *People v. Montgomery Supervisors*, 67 N. Y. 109 ; *Goodno v. Oshkosh*, 31 Wis. 127.

<sup>10</sup> *State v. Slaughter*, 70 Mo. 484.

<sup>11</sup> *Com'th v. Leech*, 24 Pa. St. 55, a case of proceedings to extend a street in a city.

<sup>12</sup> *Vanvalkenburgh v. Torrey*, 7 Cow. (N. Y.) 252.

(*a*) 13 & 14 Vict. c. 21, s. 15.

<sup>13</sup> See Stimson, *Amer. Stat. L.*, p. 143, § 1043, that, by express statute, no act or part of an act is to be deemed revived by the repeal of the repealing act unless so expressed,—as to repeals by the code or other revisions, New York, Washington, Utah,

generally, in New Hampshire, Massachusetts, Maine, Vermont, Rhode Island, New Jersey, Ohio, Indiana, Illinois, Michigan, Wisconsin, Iowa, Minnesota, Kansas, Nebraska, West Virginia, Missouri, Arkansas, Texas, California, Colorado, Dakota, Idaho, Montana, South Carolina, Mississippi, Florida, Louisiana, Arizona ; or unless both laws are passed at the same session : Virginia, Kentucky. And see *Sullivan v. People*, 15 Ill. 233 ; *Comm'l B'k v. Chambers*, 16 Miss. 9 ; *Smith v. Hoyt*, 14 Wis. 252 ; *Manlove v. White*, 8 Cal. 376 ; *Tallamon v. Cardenas*, 14 La. An. 509 ; *Witkouski v. Witkouski*, 16 Id. 232.

by them has been held to apply to repeals by implication." But it seems not to apply where the first Act was only modified by the second, by the addition of conditions, and the enactment which imposed these was, itself, afterwards repealed (*a*). In such a case, the original enactment would revive. [So, where a statute merely excepts a particular class of cases from a prior general law which continues in force, a repeal of the excepting statute returns that class of cases to the operation of the general law." Nor does such a rule apply to an act suspending a repealing act." And where remedies upon contracts have been superseded by a statute, the repeal of the latter restores them, except as to rights vested under the statute while in force."]

§ 477. [Where the rule is established by statute, that the repeal of a repealing act shall not revive the original act, without express words, a mere declaration by the Legislature that an act which repealed certain sections of another "shall not repeal" such sections, is not a law reviving or enacting them." Nor was an act applicable to the several counties of the state, but repealed as to one of them, held revived by a subsequent amendment of the first act, though using the phraseology of the same, as to its application to "the several" counties of the state." But the passage of a supplementary act, excepting certain counties from the operation of an act passed the day before, to which it was a supplement, and which repealed another statute, was held to be so far a part of the act which it modified as to continue the old law in force as to those counties."]

§ 478. **Effect of Repeal on Pending Proceedings. Prosecutions.**—Where an Act expires or is repealed, it is, as regards its

<sup>14</sup> *Milne v. Huber*, 8 McLean, 212; *Stirman v. State*, 21 Tex. 734.

(*a*) *Mount v. Taylor*, L. R. 3 C. P. 645. See, also, *Levi v. Sanderson*, and *Mirfin v. Attwood*, L. R. 4 Q. B. 830. [And see *Glaholm v. Barker*, L. R. 1 Ch. 223, 228-9.]

<sup>15</sup> *Smith v. Hoyt*, 14 Wis. 252; and see *Bank v. Collector*, 3 Wall. 495.

<sup>16</sup> *Brown v. Barry*, 3 Dall. 365.

<sup>17</sup> *Johnson v. Meeker*, 1 Wis. 436. It was held in *Winter v. Dickerson*, 42 Ala. 92, that the ratification of laws suspended revives them and liens dependent upon them, so as to be enforceable as before suspension.

<sup>18</sup> *State v. Conkling*, 19 Cal. 501.

<sup>19</sup> *People v. Tyler*, 36 Cal. 522.

<sup>20</sup> *Manlove v. White*, 8 Cal. 378.

operative effect (a), considered, in the absence of provision to the contrary, as if it had never existed, except as to matters and transactions past and closed (b). [As to all future matters, all steps yet to taken, the repealed statute upon which they are based, is treated as utterly obliterated; so that, if, after rendition of judgment, and pending an appeal therefrom, there has been a change or repeal of the law applicable to the rights of the parties, the appellate court must hear and decide the case according to the then existing law, and upon a second trial, the inferior court must recognize the change and conform to it, not to the law as it may have been at the time of the first trial.<sup>21</sup>] Where, therefore, a penal law is broken, the offender cannot be punished under it, if it expires [or is repealed] before he is convicted, although the prosecution was begun while the Act was still in force, [unless the repealing act contains a saving clause] (c). Every step taken under a statute that

(a) See *Atty.-Genl. v. Lamplough*, sup. § 49.

(b) *Per Lord Tenterden* in *Surtees v. Ellison*, 9 B. & C. 750; *Churchill v. Crease*, 5 Bing. 178; see, also, *Kay v. Goodwin*, 6 Bing. 576, *per Tindal*, C. J.; *Morgan v. Thorne*, 7 M. & W. 400; *Stevenson v. Oliver*, 8 M. & W. 24; *Simpson v. Ready*, 11 M. & W. 346; *per Parke*, B.; *Comp. R. v. West Riding*, 1 Q. B. D. 220.

<sup>21</sup> *Musgrove v. R. R. Co.*, 50 Miss. 677, cit. *Sch'r Rachel v. U. S.*, 6 Cranch, 329.

(c) 1 Hale, P. C., 291, 309; *Miller's Case*, 1 W. Bl. 451; *R. v. London (JJ.)* 3 Burr. 1456; *Charl- rington v. Meatheringham*, 2 M. & W. 228; *R. v. Mawgan*, 8 A. & E. 496; *R. v. Denton*, 18 Q. B. 761, 21 L. J. M. C. 207; *R. v. Swann*, 4 Cox, 108; *U. S. v. The Helen*, 2 Cranch, 203. [The Irresistible, 7 Wheat. 551; *Steamsh. Co. v. Joliffe*, 2 Wall. 450; *U. S. v. Tynen*, 11 Wall. 88; *Norris v. Crocker*, 13 How. 429; *Yeaton v. U. S.*, 5 Cranch, 281; *Sch. Rachel v. U. S.*, 6 Id. 329; *States v. Passmore*, 4 Dall. 372; *Anon.*, 1 Wash. 84; *U. S. v. Finlay*, 1 Abb. U. S. 364; *Hartung v. People*, 22 N. Y. 95; *People v.*

*Police Board*, 16 Abb. Pr. (N. Y.) 473; *Smith v. Banker*, 3 How. Pr. (N. Y.) 142; *Com'th v. Kimball*, 21 Pick. (Mass.) 873; *Com'th v. Marshall*, 11 Id. 350; *Com'th v. McDonough*, 13 Allen (Mass.) 581; *Jones v. State*, 1 Iowa, 365; *State v. Allaire*, 14 Ala. 435; *Griffin v. State*, 39 Id. 541; *Aaron v. State*, 40 Id. 307; *Carlisle v. State*, 42 Id. 523; *Com'th v. Duane*, 1 Binn. (Pa.) 601; *Abbott v. Com'th*, 8 Watts (Pa.) 517; *Genkinger v. Com'th*, 32 Pa. St. 99; *People v. Tisdale*, 57 Cal. 104; *People v. Hobson*, 48 Mich. 27; *State v. O'Connor*, 13 La. An. 486; *Heald v. State* 36 Me. 62; *Lewis v. Foster*, 1 N. H. 61; *State v. Ingersoll*, 17 Wis. 631; *Rood v. Ry. Co.*, 43 Id. 146; *Keller v. State*, 12 Md. 322; *Annapolis v. State*, 30 Id. 112; *Calkins v. State*, 14 Ohio St. 222; *State v. Fletcher*, 1 R. I. 193; *Taylor v. State*, 7 Blackf. (Ind.) 93; *State v. Lloyd*, 2 Ind. 659; *Howard v. State*, 5 Id. 183; *Speckert v. Louisville*, 78 Ky. 287; *State v. Cole*, 2 McCord (S. C.) 1; *State v. Cross*, 4 Jones L. (N. C.) 421; *State v. Long*, 73 N. C. 571; *Scott v. Com'th*, 2 Va. Cas. 54; *Montgomery v. State*, 2 Tex. App. 618; *Tuton v. State*, 4

has been repealed is utterly void ; presentment, trial, conviction and sentence become illegal.<sup>22</sup> If an indictment has been found, it may be quashed on motion ;<sup>23</sup> for the court is bound to take notice of the repeal.<sup>24</sup> Though a conviction has been had, the judgment is arrested ;<sup>25</sup> and though judgment has been entered, if an appeal from it, or other proceeding for review of it is pending, the judgment must be set aside.<sup>26</sup> And so, even after conviction, appeal and argument, but before final judgment ;<sup>27</sup> and, though a repeal after final judgment<sup>28</sup> will not ordinarily arrest the execution of the sentence,<sup>29</sup> and will not do so even in capital cases where sentence has been pronounced and the day set for execution,<sup>30</sup> yet, in the latter class of cases, if the sentence of death has been pronounced, but not executed on the day set for its execution, a repeal of the statute, before the criminal is re-sentenced requires his discharge.<sup>31</sup> The same effect follows any modification of a penal statute, which exempts, without special reservation, a particular class from its operation.<sup>32</sup>

§ 479. **Effect, etc., on Actions of Penal Nature, or Where Jurisdiction Depends on Statute Repealed.**—[Actions in their nature

Id. 472 ; Pinckard v. State, 13 Id. 373 ; Mulkey v. State, 16 Id. 53 ; Wall v. State, 18 Tex. 682 ; Greer v. State, 22 Id. 588 ; Hirschburg v. People, 6 Col. 145 ; Bish., Wr. L., § 177, and cases in note 1, p. 166.]

<sup>22</sup> Hirschburg v. People, 6 Col. 145.

<sup>23</sup> Carlisle v. State, 42 Ala. 523 ; Annapolis v. State, 30 Md. 112 ; U. S. v. Finlay, 1 Abb. U. S. 364.

<sup>24</sup> Musgrove v. R. R. Co., 50 Miss. 677.

<sup>25</sup> Com'th v. Duane, 1 Binn. (Pa.) 601, 608 ; State v. Long, 78 N. C. 571 ; Com'th v. Kimball, 21 Pick. (Mass.) 373 ; Com'th v. Marshall, 11 Id. 350 ; Norris v. Crocker, 13 How. 429.

<sup>26</sup> Lewis v. Foster, 1 N. H. 61 ; Tuton v. State, 4 Tex. App. 472 ; Hubbard v. State, 2 Id. 506 ; Fitze v. State, 13 Id. 372 ; Speckert v. Louisville, 78 Ky. 287 ; where the court, however, ordered the appel-

lant to pay the costs, and where it was also held that the repeal took away the prosecuting officer's right to fees in the action.

<sup>27</sup> Keller v. State, 12 Md. 322.

<sup>28</sup> Or after affirmance in a higher court of the judgment of the lower : People v. Hobson, 48 Mich. 27.

<sup>29</sup> Bish., Wr. L., § 177, cit. State v. Addington, 2 Bailey (S. C.) 516 ; Foster v. Medfield, 3 Met. (Mass.) 1.

<sup>30</sup> See Aaron v. State, 40 Ala. 307.

<sup>31</sup> Ibid. Nor would the power to pronounce sentence be saved, in such a case, by a saving of pending prosecutions or prosecutions to be brought for offences committed before its passage ; for the prosecution cannot be said any longer to be pending : Ibid.

<sup>32</sup> See State v. Bank, 1 Stew. (Ala.) 347 ; Com'th v. Leftwich, 5 Rand. (Va.) 657 ; Com'th v. Welsh, 2 Dana (Ky.) 330.

penal, pending at the time of the repeal of the statute authorizing them, fall with it." A statute authorizing the entry of judgment for double the amount of damages found by the jury being in the nature of a penal statute," the repeal of the statute after verdict, but before judgment, will defeat the right to such recovery." A fortiori must such be the result, where, though the liability has arisen, no proceeding has been taken for its enforcement." And "the same rule applies to all proceedings, whether civil or criminal, going on by virtue of a statute at the time of its repeal." Wherever the jurisdiction exercised in proceedings depends wholly upon statute, and the statute is repealed, or expires by its own limitation," the jurisdiction is gone, and with it the whole proceeding, imperfect at the time of the repeal or expiration, falls to the ground, unless there be a reservation as to pending rights or causes." So, where, after a report made by viewers, appointed by a certain court under an act, made in favor of a road,—a review granted,—and report of re-viewers filed, also in favor of the road,—an act took away the jurisdiction of that court, the latter could proceed no further.<sup>40</sup> Where a commissioner, to whom, in pursuance of a statute, a case had been referred by consent, made his report after the repeal of the statute, the court could not act upon exceptions filed to the report.<sup>41</sup> Where a writ of foreign attachment was issued under an act, which, during the pendency of the suit was repealed with-

<sup>38</sup> Union Iron Co. v. Pierce, 4 Biss. 327; Com'th v. Shopp, 1 Woodw. (Pa.) 123.

<sup>39</sup> Ante, § 331.

<sup>40</sup> Bay City, etc., R. R. Co. v. Austin, 21 Mich. 390. Comp. Worthen v. Ratcliffe, 42 Ark. 330, post, § 481.

<sup>41</sup> Com'th v. Standard Oil Co., 101 Pa. St. 119, the case of a penalty added to a tax for certain shortcomings: see post, § 483.

<sup>42</sup> Sedgw., pp. 111-112.

<sup>43</sup> Assessors v. Osborne, 9 Wall. 567; Stoevers v. Immell, 1 Watts (Pa.) 258; Com'th v. Beatty, Id. 382.

<sup>44</sup> Merch. Ins. Co. v. Ritchie, 5 Wall. 541; Exp. McCordle, 7 Id. 506; Gates v. Osborne, 9 Id. 567;

Baltimore, etc., R. R. Co. v. Grant, 98 U. S. 398; South Carolina v. Gaillard, 101 Id. 433; Ill., etc., Canal v. Chicago, 14 Ill. 334; North Canal Str. Road, 10 Watts (Pa.) 351; Fenelon's Pet'n, 7 Pa. St. 173; Hampton v. Com'th, 19 Id. 329; Uwchlan Tp. Road, 30 Id. 156; Road in Hatfield, 4 Yeates (Pa.) 392; Lamb v. Schotter, 54 Cal. 319; Macnawhoc Plant'n v. Thompson, 36 Me. 365; Hunt v. Jennings, 5 Blackf. (Ind.) 195; Smith v. Arapahoe Dist. Ct., 4 Col. 162.

<sup>45</sup> North Canal Str. Road, supra; and see North Str., 1 Pears. (Pa.) 199.

<sup>46</sup> State v. Brookover, 22 W. Va. 214.

out saving pending suits, the proceeding was held to be at an end, and all subsequent steps in it *coram non jure* and void.<sup>42</sup> And, of course, where] in an action for less than forty shillings, the defendant pleaded that the debt ought to have been sued for in a local Court of requests, the Act establishing that Court having been repealed after the plea but before the trial, the plea failed (a). Where plaintiff got a verdict for one shilling, in June, 1840, and the judge did not grant a certificate to deprive him of costs under the 43 Eliz. c. 6, until the following month, by which time that Act was repealed by the 3 & 4 Vict. c. 24; it was held that the power of certifying could not be exercised, in such a case, after the repeal, and that the certificate was void (b). So, where an action was brought and judgment recovered in 1867, in a case where title was in question, and the plaintiff would then have had his costs, either by the presiding judge's certificate, under the 13 & 14 Vict. c. 61, or by a judge's order, to which he would have been entitled *ex debito justitiæ* under the 15 & 16 Vict. c. 54, but he obtained neither until after the 1st of January, 1868, when both of those Acts stood repealed by the 30 & 31 Vict. c. 142: it was held that the powers under those Acts had ceased to exist, and could not be exercised in the plaintiff's favor (c).

§ 480. **Effect, etc., on Right's and Remedies Founded Solely on Statute.**—[The same rule applies to rights and remedies founded solely upon statute, and to suits pending to enforce such remedies.<sup>43</sup> If, at the time the statute is repealed, the remedy has not been perfected or the right has not become vested, but still remains executory, they are gone.<sup>44</sup> Such is

<sup>42</sup> *Stephenson v. Doe*, 8 Blackf. (Ind.) 508.

(a) *Warne v. Beresford*, 2 M. & W. 848. If an Act which authorized the laying of rails on a road were repealed, the rails would probably not remain lawfully: *R. v. Morris*, 2 B. & Ad. 441.

(b) *Morgan v. Thorne*, 7 M. & W. 400.

(c) *Butcher v. Henderson*, L. R. 8 Q. B. 335. But see contra, *Restall v. London & S. W. R. Co.*,

L. R. 3 Ex. 141, where, however, *Morgan v. Thorne*, was not cited. See, also, *Wood v. Riley*, L. R. 3 C. P. 26; *Doe v. Holt*, 21 L. J. Ex. 335; *Comp. Doe v. Roe*, 23 Id. 17; *Hobson v. Neale*, Id. 25, 179.

<sup>43</sup> *Bennet v. Hargus*, 1 Neb. 419.

<sup>44</sup> *Id.*; *Butler v. Palmer*, 1 Hill (N. Y.) 324; *Bailey v. Mason*, 4 Minn. 546; *Van Inwagen v. Chicago*, 61 Ill. 31.



the effect, *e. g.*, of an act taking away the right to acquire a mechanic's lien, if the requisite proceedings to fix the lien have not been completed ;<sup>48</sup> of the repeal of an act by which the Legislature, *ex mero motu*, gives an individual property belonging to the state, if the grant be not accepted ;<sup>49</sup> of an act repealing the authority given to towns to pay bounties to volunteers, and prohibiting them from making appropriations for such purpose, even after a vote of the town to pay such bounties.<sup>50</sup> So, where an act had been passed authorizing mortgage debtors to redeem their property sold under foreclosure decree, within one year from the date of sale, and a sale was made on December 27, 1837, and a subsequent act, to take effect in November, 1838, repealed the law referred to, it was held, that, as the right acquired under the repealed law was inchoate merely, until actual exercise of it,<sup>51</sup> there could be no right to redeem from the sale of December 27, 1837, after the repealing act went into effect.<sup>52</sup> Again, where an act authorizing the opening of streets directed the assessment of damages to property holders upon lots benefited by the improvement, and gave a proceeding to enforce payment thereof, the repeal of the act, before the consummation of the proceedings, destroyed as well the right to recover as the obligation to pay.<sup>53</sup> So, too, the defence of usury falls with statute on which it rests.<sup>54</sup>

§ 481. [The rule would, of course, be otherwise, if the rights referred to had become vested before the repeal.<sup>55</sup> If, *e. g.*, the grant by the Legislature had been accepted, a repeal of the statute would not deprive the grantee of the property ;<sup>56</sup> for rights that have become vested under a statute cannot ordinarily be divested by a repeal of it.<sup>57</sup>

<sup>48</sup> Bailey v. Mason, *supra*. See Templeton v. Horne, 82 Ill. 491, as to the control of the Legislature over such remedies.

<sup>49</sup> See James v. Dubois, 16 N. J. L. 285.

<sup>50</sup> Veats v. Danbury, 37 Conn. 412.

<sup>51</sup> See ante, § 281.

<sup>52</sup> Butler v. Palmer, 1 Hill (N. Y.) 324.

<sup>53</sup> Hampton v. Com'th, 19 Pa. St. 329. See this case, ante, § 461, note.

<sup>54</sup> Ewell v. Daggs, 108 U. S. 143. Comp. Whitaker v. Pope, 2 Woods, 463, and *infra*, note 63.

<sup>55</sup> Comp. ante, §§ 271, et seq.

<sup>56</sup> James v. Dubois, *supra*.

<sup>57</sup> *Ibid.* ; Den v. Robinson, 5 Id. 689 ; Rice v. R. R. Co., 1 Black, 358 ; Naught v. O'Neal, 1 Ill. App. 29 ; Taylor v. Rushing, 2 Stew. (Ala.) 160 ; Davis v. Minor, 2 Miss. 183 ; M'Mechen v. Mayor, 2 Har. & J. (Md.) 41 ; Exp. Graham, 13 Rich. (S. C.) 277 ; Mitchell v. Doggett, 1 Fla. 356.

Thus, where a plaintiff had performed services for a subcontractor on a railroad and gave notice to the company of his claim, which, under the then existing statute, fixed it with liability therefor, and the act was subsequently repealed, it was held that he had acquired a vested right of action against the company which was not affected by the repeal, and that his suit should be sustained.<sup>55</sup> So, it has been held that the repeal of a statute takes away no right of action for damages which has already accrued.<sup>56</sup> Thus, where an act which made it unlawful for a railroad company to charge higher freight rates than those prescribed in the act was repealed, it was held that a party who, during the time when the act was in force, was compelled to pay higher rates, and did so under protest, was not deprived, by the repeal, of his right of recovery therefor.<sup>57</sup> And even where one had, under a certain statute, acquired a right to the payment of double the value of his improvements on donated land, it was held that this was a vested right which would not be divested by the repeal of the statute.<sup>58</sup>

§ 482. **Limits of this Doctrine.**—[The doctrine, indeed, of the destruction of imperfect rights and actions depending on statutes, by their repeal, must not be carried beyond its proper scope. It has been said that an act repealing, or in anywise modifying, the remedy of a party by action or suit, should not be construed to affect actions or suits brought before the repeal or modification.<sup>59</sup> Whilst this statement is probably too broad, it is nevertheless true, that, where the effect of the new legislation is not to take away the jurisdiction or right previously existing, nor to deny a remedy for its enforcement substantially like the one previously allowed, but merely to change the remedy, the right and the jurisdiction continue under the form directed by the new act, where it applies, or else under the old law.<sup>60</sup> Thus, where,

<sup>55</sup> Streubel v. R. R. Co., 12 Wis. 87.

<sup>56</sup> Grey v. Mobile Trade Co., 55 Ala. 387. And see ante, § 75, note 31.

<sup>57</sup> Graham v. Ry. Co., 53 Wis. 473.

<sup>58</sup> Worthen v. Ratcliffe, 42 Ark.

330. Comp. Bay City, etc., R. R. Co. v. Austin, 21 Mich. 390, ante, § 479.

<sup>59</sup> Newsom v. Greenwood, 4 Oreg. 119.

<sup>60</sup> Hickory Tree Road, 43 Pa. St. 139; Uwchlan Tp. Road, 80 Id. 156.

pending a proceeding for the laying out of a road, under an act requiring the appointment of six viewers, an act was passed repealing this law as to a certain county by changing the mode of proceeding, (*e. g.*, in substituting three for six viewers,) but not the court in which the proceedings were to be had, or the basis of the exercise of the jurisdiction, or the powers of the court in the proceedings, it was held that the proceeding might be perfected under the new law, and that, upon petition for a review, the appointment of three viewers for the purpose was proper." So, it is said, that the repeal of a statute prescribing merely a particular mode of trial, will not annul proceedings had under the statute in cases pending at the time of repeal;" and that, where a statutory remedy for a right created by the same statute is repealed, but the repealing statute gives a substantially similar remedy, the right may be enforced in accordance with the method prescribed by the later act."

§ 483. [Even in the case of statutes falling, strictly or in a general sense, under the head of penal laws, the intention of the Legislature has been permitted to prevail over the rigid application of the rule. As regards criminal statutes, the rule that the repeal of the statute under which a prisoner

"Hickory Tree Road, *supra*; and see *Uwchlan Tp. Road, supra*.

<sup>62</sup> *Danforth v. Smith*, 23 Vt. 247.

<sup>63</sup> *Knoup v. Bank*, 1 Ohio St. 603; and see *McMullen v. Guest*, 6 Tex. 275, also *Nash v. White's B'k*, 37 Hun (N. Y.) 57. In the latter case, an act of 1870 authorized the recovery of double the amount of usurious interest taken by banks in excess of seven per cent. An act passed in 1880 changed this lawful rate of interest to six per cent. An action had been begun in 1873, and was tried for the third time in 1884. It was held that the act of 1880 did not take away the plaintiff's right to recover the penalties of the act of 1870. It was said that the act of 1880 did not repeal the act of 1870 as a whole, nor repeal and re-enact it; its provisions and effect were prospective only: the right to "re-

cover back twice the amount of the interest thus paid" in excess of legal interest remained undisturbed by the act of 1880, and was still a part of the act of 1870, which, as amended, still declared the right to sue and recover. "This right thus expressed covers two periods, so to speak: one, when the legal rate of interest was seven, and the other later, when it is six per cent. per annum, as the boundary of profit to banking associations in the discount of commercial paper." *Knox v. Baldwin*, 80 N. Y. 610, is distinguished on the grounds that there the amendment in question was "so as to read as follows," (*See ante*, § 196;) and distinctly did away with the original provision on which the action was founded, and that the action was begun after the amendment had taken effect.

is being prosecuted requires his discharge, is said to be founded upon a presumption of legislative pardon." Proceeding upon such a basis, the rule could, of course, not apply where there is no room for such a presumption." Thus, where an act was passed providing a new system for the granting of licenses for, and regulating, with new punishments, the sale of liquors, but postponing until a certain date the going into effect of the new law, by permitting licenses to be issued under the old law up to that date, but not beyond, it was held, that, the old law remained in force as to such licenses during their lives." The presumption that a statute was designed to operate prospectively, both as an enactment and as a repeal, was made the ground of a decision that an act consolidating the tax-laws of a state, and throughout making its provisions "hereafter" applicable, did not affect settlements made before its passage but remaining uncollected;" whilst an obvious limitation to its proper scope and purpose required the construction whereby a statute repealing an act authorizing the levying of a tax and imposing a penalty for failure to pay the same, was held to forbid the collection of the penalties, but not to invalidate the assessments so as to relieve tax-payers from the obligation to pay the tax."

§ 484. *Effect of Savings in Penal Acts.*—[Subject to these exceptional considerations, and within the reasonable limits pointed out, it may be laid down as a general rule that the only way in which, in any of the cases referred to, the power to perfect a right or proceeding can survive the repeal of the act creating or authorizing it, is by express reservation

<sup>64</sup> See *State v. Brewer*, 22 La. An. 273; *Governor v. Howard*, 1 Murph. (N. C.) 465.

<sup>65</sup> See *State v. Brewer*, *supra*.

<sup>66</sup> *Sanders v. Com'th*, 20 W. N. C. (Pa.) 226. Indictments found before the going into effect of the Kentucky code, were held triable under it: *Laughlin v. Com'th*, 13 Bush (Ky.) 261. See, also, that an offence committed before the adoption of certain revisions may be inquired into and prosecuted as if they never had been adopted: *People v. Sloan*, 2 Utah, 326; and

see *U. S. v. Barr*, 4 Sawyer, 254 (Rev. St., § 13); and that an indictment found under an act repealed is unaffected by the repeal in Iowa and Arkansas, see *State v. Schaffer*, 21 Iowa, 486; *McCuen v. State*, 19 Ark. 634.

<sup>67</sup> *Pacif. & Atlant. Tel. Co. v. Com'th*, 66 Pa. St. 70. And see *Files v. Fuller*, 44 Ark. 273.

<sup>68</sup> *Belvidere v. R. R. Co.*, 34 N. J. L. 193. See *Com'th v. Standard Oil Co.*, 101 Pa. St. 119, *ante*, § 479.

in the act of repeal."<sup>69</sup> The rule of construction applicable to such clauses has already been examined.<sup>70</sup>] An enactment that offenders should be prosecuted and punished for past offences, as if the Act against which they had offended had not been repealed, was held to create no fresh power to punish, but only to preserve that which before existed; and not to authorize punishment after the Act which created the offence had ceased to exist (a). [But a saving of "all rights of suit or prosecution under any prior act, on account of the doing or committing of any act hereby prohibited," was held to embrace offences committed previously to the passage of the repealing act under a previous law repealed by it." A saving clause in an amendment that the amended law shall not apply to trials for offences committed before its passage continues the old law as to those offences.<sup>71</sup> A saving of "pending prosecutions and offences theretofore committed," in an act which took effect September 19, 1881, saved a prosecution for a crime committed August 15, 1881, though the indictment was not found until September 22, 1881.<sup>72</sup> But a saving of any prosecution pending at the date of the passage of the repealing law does not apply to a case where the prosecution is closed, and judgment and sentence have been pronounced, but the day for its execution not fixed." And obviously, where, in 1840, a person committed what, under the act of 1839, then in force, was murder; and in 1843 the act of 1839 was repealed with a saving as to crimes already committed under it; and in 1851 the act of 1843 was repealed by the adoption of a code which saved the right to punish offences against any statute repealed by it, there could be no conviction or punishment for the offence committed against the act of 1839, because the code did not repeal that act.<sup>73</sup>]

<sup>69</sup> *Smith v. Banker*, 3 How. Pr. (N. Y.) 142; *Governor v. Howard*, 1 Murph. (N. C.) 465; *The Irresistible*, 7 Wheat. 551.

<sup>70</sup> *Ante*, § 186.

(a) *The Irresistible*, 7 Wheat. 551. *Comp. R. v. Smith*, 1 L. & C. 131, 81 L. J. M. C. 105.

<sup>71</sup> *U. S. v. Kohnstamm*, 5 Blatchf. 222.

<sup>72</sup> *People v. Gill*, 7 Cal. 356.

<sup>73</sup> *Sanders v. State*, 77 Ind. 227.

<sup>74</sup> *Aaron v. State*, 40 Ala. 307.

<sup>75</sup> *Jones v. State*, 1 Iowa, 395. Of course, the right to punish an offence against a repealed statute, being reserved, fails with the repeal of the reserving act: *Ibid.* As to the effect of a general act saving actions, etc., under repealed statutes, see *Files v. Fuller*, 44 Ark. 273, *ante*, § 173, note. Such gen-

§ 485. **Effect of Savings of Civil Rights and Procedure.**—Under earlier friendly societies' Acts, claims against a society could be enforced only by suing its officers. The 25 & 26 Vict. c. 87, repealing those Acts, provided for the incorporation of the societies, and provided also that all legal proceedings then pending against an officer on account of a society might be prosecuted by or against the society in its registered name, without abatement. But the Act made no provision respecting the recovery of claims which were then pending, but which had not been sued for. It was held that neither the officers (*a*), nor the society itself, in its new corporate capacity (*b*), could be sued in respect of such claims; but that the individual members of the society were liable to be sued for them (*c*). [Under an act amending the charter of a city and restricting its right to make appropriations, but providing that nothing in the act should in any measure affect or impair proceedings had under the previous law, or any rights or privileges acquired thereunder, it was held that the city auditor was bound to issue the warrants required by an ordinance appropriating money for the ensuing year, passed before the adoption of the amendment." An act repealing a statute prescribing a method for the re-assessment of damages for land taken for a highway, but providing that it should not affect the validity of any lay-out of any highway theretofore made under existing laws, was held not to affect the validity of a re-assessment just previously to the enactment made out by the jury by order of court, but not returned to the court and accepted." Under a general statutory provision that the repeal of an act shall not affect "a right accruing, accrued, acquired, or established," it was held that the repeal of an act allowing damages for injuries on the highway did not affect an existing cause of action, although no suit therefor had been commenced."

eral statutes prescribing the effect of legislation are elsewhere called "a set of quasi-legislative by-laws," which, left unchanged by successive Legislatures, are virtually re-enacted and continued by them; *Gilleland v. Schuyler*, 9 Kan. 569, 581.

(*iii*) *Toutill v. Douglas*, 93 L. J.

Q. B. 66.

(*b*) *Linton v. Blakeney Co-op. Soc.*, 3 H. & C. 853, 34 L. J. 211.

(*c*) *Dean v. Mellard*, 15 C. B. N. S. 19, 32 L. J. 282.

<sup>16</sup> *Beatty v. People*, 6 Col. 538.

<sup>17</sup> *Downs v. Huntington*, 35 Conn. 588.

<sup>18</sup> *Harris v. Townshend*, 5t Vt.

§ 486. **What not within Saving of Existing Rights, etc.**—[The saving of existing rights, however, does not include everything that may be claimed by a party as a matter of right. Thus, where an act gives certain rights of action and defence upon grounds of public policy, *e. g.*, the act directed against stock-jobbing, no vested rights are conferred, and the repeal of the provision takes away all its benefits as regards contracts and actions existing at the time of the repeal." Nor has any class of individuals or corporations a vested right in an exemption from common burdens; and hence the repeal of a proviso in favor of savings banks of a certain class, exempting them from the payment of a tax upon deposits to which the act made other banking companies liable, makes them liable to the imposition." In fact, in all matters of pure legislation, contract and vested rights not resulting, no one Legislature can bind another, and hence the repeal of such a statute puts an end to all proceedings pending undetermined under it." Nor can any person invoke the aid of a repealed statute who has not, previous to the repeal, acquired vested rights under it." And, of course, a saving of any rights which any person may have lawfully acquired to property affected by the act cannot aid one who has no lawful right thereto, nor protect a possession wrongfully acquired by him." Nor is the continuance of a case, or the time within which pleadings are to be filed, among "rights accrued," within the meaning of a clause saving such."

§ 487. **Saving of Prosecutions and Rights not a Saving of Procedure.**—[Even where prosecutions and rights of action under a repealed enactment are preserved by a saving clause in the repealing act, yet, after the latter takes effect, they must be carried on and enforced in conformity with the provisions of the repealing statute, the one repealed being preserved

716. See, also, *Treat v. Strickland*, 23 Me. 234. And comp. ante, § 481.

<sup>79</sup> *Washburn v. Franklin*, 35 Barb. (N. Y.) 599; and see *Kimbrow v. Colgate*, 5 Blatchf. 229.

<sup>80</sup> *B'k for Savings v. Collector*, 3 Wall. 495.

<sup>81</sup> *Gilleland v. Schuyler*, 9 Kan.

569; *Leathers v. Bank*, 40 Me. 386.

<sup>82</sup> *Times Pub. Co. v. Ladomus*, 5 W. N. C. (Pa.) 33.

<sup>83</sup> *White v. White*, 2 Metc. (Ky.) 185.

<sup>84</sup> *Brotherton v. Brotherton*, 41 Iowa, 112. And see § 285

only to the extent of furnishing the right of action or prosecution, not the practice or mode of procedure;" so, that, where a statute repealed another under which an indictment had been found, saving, however, the right to proceed for any past violation of the repealed statute, the manner of applying for a change of venue in the case, was, after the repealing act took effect, held governed by its provisions." And even a saving of rights accrued or established, and of proceedings, suits or prosecutions commenced before the repealing act shall take effect, but omitting to provide that such suits, etc., shall proceed according to the law under which they were commenced, was held not to protect the same against the effect of the act as to procedure."<sup>85</sup>]

§ 488. **Effect of Repeal on Contracts in Violation of Statute Repealed.**—If a contract was illegal when it was entered into, and the statute which made it so is afterwards repealed, the repeal will not give validity to the contract, unless it appears that the repealing enactment was intended to have a retrospective operation, and thus to vary the relation of the parties to each other (*a*). [And conversely, an agreement being legal when entered into, but by a subsequent statute rendered illegal, acts done under it while it was legal, remain legal.<sup>86</sup>]

<sup>85</sup> Farmer v. People, 77 Ill. 322.

<sup>86</sup> Ibid.; and see Laughlin v. Com'th, 13 Bush (Ky.) 261. But see Dobbins v. Bank, 112 Ill. 553, where, existing rights under a repealed statute being saved by the repealing act, it was held that the earlier act applied to suits pending at the time of the passage of the later,—Scott, Walker and Dickey, J.J., diss.

<sup>87</sup> People v. Livingstone, 6 Wend. (N. Y.) 526. See this case, ante, § 290. The New Jersey Revision, p. 1120, provides, that, where no new remedy has been given for the enforcement of a right accrued under a statute that is repealed, the old remedy remains; and this is said to be the case where the repeal is by force of a constitutional provision: Wilson v. Herbert, 41 N. J. L. 454. And see, as to saving effect of § 1, Kan. Gen. St. 998, in

civil and criminal cases: State v. Boyle, 10 Kan. 113; State v. Crawford, 11 Id. 32.

(*a*) Jaques v. Withy, 1 H. Bl. 65; Hitchcock v. Way, 6 A. & E. 943. Comp. Hodgkinson v. Wyatt, 4 Q. B. 749. [Milne v. Huber, 3 McLean, 212; Decell v. Lewenthal, 57 Miss. 381; Anding v. Levy, Id. 51; Roby v. West, 4 N. H. 285; Bانشور v. Mansel, 47 Me. 58. But see Central B'k v. Empire Stone Co., 26 Barb. (N. Y.) 23, where the repealed act was merely a measure of public policy. A contract being illegal by reason of a penalty imposed by law upon the act contracted for, is not rendered legal, as between the parties, by a remission by the government of the penalty: Petrel Guano Co. v. Jarnette, 25 Fed. Rep. 675.]

<sup>88</sup> Bennett v. Woolfolk, 15 Ga. 213. See ante, § 462.



§ 489. **Time when Repeal Takes Effect.**—The 13 & 14 Vict. c. 21, s. 6, declares that when any Act repeals another in whole or part, and substitutes some provision or provisions in lieu of the provision or provisions repealed, the latter remain in force until the substituted provision or provisions come into operation by force of the last-made Act. This provision is only declaratory of the common law rule (*a*). [And the rule is the same, though the repealing clause use the present tense;” for an act speaks as of the time of its going into effect;” so that “heretofore,” or “hereafter,” refers to the date when the act goes into effect, not the time of its final passage.” On the other hand,] if a temporary Act be continued by a subsequent one, or an expired Act be revived by a later one, all infringements of the provisions contained in it are breaches of it rather than of the renewing or reviving statute (*b*).

§ 490. **Re-enactment not a Repeal in Spite of Express Repealing Clause.**—[It seems, indeed, to be the general understanding that the re-enactment of an earlier statute is a continuance, not a repeal of the latter, even though the later act expressly repeals the earlier. The mere re-enactment of an existing law, in the same or substantially the same terms, without words of repeal, and in the absence of conflict, or an intention to supersede, does not, of course, necessarily, repeal the old law.” But even a repealing act re-enacting the provisions

(*a*) *Per cur.* in *Butcher v. Henderson*, L. R. 3 Q. B. 338. [*Standing v. Alford*, 1 Pick. (Mass.) 33; *McArthur v. Franklin*, 16 Ohio St. 193; *Moore v. Houston*, 3 S. & R. (Pa.) 169, 185. And see *P. & A. Tel. Co. v. Com'th*, ante, § 483.]

<sup>88</sup> *Lyner v. State*, 8 Ind. 490.

<sup>89</sup> *Rice v. Ruddiman*, 10 Mich. 125. It has been said that a saving clause in a repealing act relates to the time of its passage, not of its taking effect, though the act take effect from the first moment of the day: *Re Ankrim*, 3 McLean, 285; *Re Richardson*, 2 Story, 571. But see contra, as to an act saving rights at the date of its passage: *Rogers v. Vass*, 6 Iowa, 405.

<sup>91</sup> *Charless v. Lamberson*, 1 Iowa,

435, as also the word “now”: *Clark v. Lord*, 20 Kan. 390, 396. Consequently, where statutes were held to take effect on the first day of the session, an act passed at a session beginning in November, 1827, to take effect on January 15, “next,” but not approved until January 7, 1828, was held nevertheless to go into operation on January 15, 1828: *Weeks v. Weeks*, 5 Ired. Eq. (N. C.) 111. *Comp. Fosdick v. Perrysburg*, 14 Ohio St. 472, ante, § 33.

(*b*) *R. v. Morgan*, 2 Stra. 1066; *Shipman v. Henbest*, 4 T. R. 109; *Dingley v. Moor*, Cro. Eliz. 750.

<sup>92</sup> See *Alexander v. State*, 9 Ind. 337; *Cordell v. State*, <sup>92</sup> Id. 1; *Kessler v. Smith*, 66 N. C. 154;

of the repealed statute, in the same words, is construed to continue them in force without intermission; the repealing and re-enacting provisions taking effect at the same time." So, it was held, that, where an act repealing another which provided for the appointment of certain officers, instantly, by the second section, re-enacted the repealed act, the repeal was rendered inoperative, the former law left in force, and the officers appointed under the same, whose terms of office had not expired, remained in office." So the repeal of a general corporation law by a statute substantially re-enacting and extending its provisions, does not terminate the existence of corporations formed under it, but is to be regarded as a continuance, with modifications, of the old law." The principle has been applied also to a revision which repealed the acts collated and consolidated, but immediately, in its own provisions, re-enacted them literally or in substance, so that there was never a moment when the repealed acts were not practically in force." So, the repeal and re-enactment, in a revision of laws, of a statutory provision authorizing a town to make a certain by-law was held not to affect the validity of the by-law.<sup>97</sup> And it has been applied to criminal statutes, so as to permit a conviction for an offence against the re-enacted old law,<sup>98</sup> even where the re-enacting law undertook to repeal it;<sup>99</sup> the re-enactment being construed a continuance.

§ 491. **Limits of this Rule.**—[But the effect seems to be different where a period of time has elapsed between the repeal and the re-enactment. Thus, an act passed in 1873

nor necessarily the re-enactment of a former section of a statute in a later section: *Martindale v. Martindale*, 10 Ind. 566, cit. *Alexander v. State*, supra; *Cheezem v. State*, 2 Id. 149.

<sup>98</sup> *Fullerton v. Spring*, 3 Wis. 667; *Laude v. Ry. Co.*, 83 Id. 640.

<sup>94</sup> *State v. Baldwin*, 45 Conn. 134.

<sup>95</sup> *United Hebrew Benev. Ass'n v. Benshimol*, 130 Mass. 325, 327, cit. *Wright v. Oakley*, 5 Met. (Mass.) 400, 406; *Steamsh. Co. v.*

*Joliffe*, 2 Wall. 450, 456; and see ante, § 194.

<sup>96</sup> *Middleton v. R. R. Co.*, 26 N. J. Eq. 269; *Scheftels v. Tabert*, 46 Wis. 439; and see *Ballin v. Ferst*, 55 Ga. 546, as to U. S. Rev. Stat.

<sup>97</sup> *Lisbon v. Clarke*, 18 N. H. 234. Similarly it was held that an ordinance passed by a city under a certain section of its charter was not affected by a repeal of that section: *Chamberlain v. Evansville*, 77 Ind. 542.

<sup>98</sup> *State v. Gumber*, 37 Wis. 298.

<sup>99</sup> *State v. Wish*, 15 Neb. 448.

required railroad companies to fence when ordered by commissioners. A company was ordered to fence. The act was repealed in 1874. Upon its re-enactment, in 1875, it was held that the duty to fence under the order terminated with the repeal, and was not revived by the re-enactment.<sup>100</sup> "In this respect it stood as if no duty to fence had previously existed; and that duty could only come into existence by the combined force of the law of 1875, and of an order under and in accordance with it."<sup>101</sup> And even where the re-enactment is simultaneous with the repeal, and in the same terms with the previous law, a repeal of the latter will be held to take place, (in the absence of express repealing words, and in the face of statutory rule of construction requiring provisions of any statute, so far as they are the same as those of any prior enactment, to be construed as a continuance of such provision and not as an amendment, unless such construction would be inconsistent with the manifest intention of the Legislature, etc.,) where the former statute has wholly accomplished its purpose and exhausted its force.<sup>102</sup>

§ 492. **Effect of Repeal of Act Incorporated by Reference in Another.**—Where the provisions of a statute are incorporated, by reference, in another; [where one statute refers to another for the powers given or rules of procedure prescribed by the former, the statute or provision referred to or incorporated becomes a part of the referring or incorporating statute;<sup>103</sup> and if] the earlier statute is afterwards repealed, the provisions so incorporated, [the powers given, or rules of procedure prescribed by the incorporated statute,] obviously continue in force, so far as they form part of the second enactment (*a*). Thus, when the 32 & 33 Vict. c. 27, enacted

<sup>100</sup> *Kane v. R. R. Co.*, 49 Conn. 139.

<sup>101</sup> *Ib.*, at pp. 140, 141.

<sup>102</sup> *Emporia v. Norton*, 16 Kan. 236, *e. g.*, an act authorizing an appropriation, validating prior defective acknowledgments, or irregular tax proceedings: *Ib.*

<sup>103</sup> *Turney v. Wilton*, 36 Ill. 385; *Nunes v. Wellisch*, 12 Bush (Ky.) 363.

(*a*) *R. v. Stock*, 8 A. & E. 405; *R. v. Merionethshire*, 6 Q. B. 343.

[*Spring, etc., Works v. San Francisco*, 22 Cal. 434; *Sika v. R. R. Co.*, 21 Wis. 370. So, a local and special act, which, by reference, adopts provisions relating to procedure from an existing general law, is not necessarily abrogated or affected by the subsequent repeal of the latter: *Schwenke v. R. R. Co.*, 7 Col. 512. In New York it was enacted by Laws 1880, ch. 245, that "the repeal of any provision of the existing laws

that certain provisions as to appeals to Quarter Sessions comprised in the 9 Geo. 4, c. 61, should have effect respecting the grant of certificates under the new Act, and the 35 & 36 Vict. c. 94, repealed the Act of Geo. 4, it was held that those provisions remained in full force, so far as they formed part of the 32 & 33 Vict. (a). The 9 Geo. 4, c. 40, s. 54, empowered justices of the county where a prisoner was detained in custody, who had been acquitted of felony on the ground of insanity, to determine his settlement, and to order his parish to pay such a sum as a Secretary of State should direct, for his maintenance; and the Act contained also provisions with reference to appeals from such orders. The 3 & 4 Vict. c. 54, s. 7, after reciting the above section, repealed so much of it as related to the Secretary of State, and enacted that the justices should order the payment of such sum as they should, themselves, direct. Five years later, the Act of Geo. 4 was totally repealed. It was held that the justices had authority to make the order under the Act of 3 & 4 Vict. (b), and that perhaps even the right of appeal had been impliedly preserved (c).

§ 493. [But, when the incorporating act does not in terms declare that the mode of procedure prescribed by another act, not specifically referred to, but being then the only one established by law and incorporated by the general reference "the same as" in the case provided for by the earlier act, it is said to be intended "as a rule for future conduct," a rule "always to be found, when it is needed, by reference to the law . . . existing at the time when the rule is invoked."<sup>104</sup> And similarly in the case of a statute which prohibited contests of speed of animals, etc., "excepting such as are by special laws for that purpose expressly allowed," it was

which has been amended by a subsequent provision of those laws, not expressly repealed by this act, does not affect the subsequent provision." It was held, in *Wead v. Cantwell* (N. Y.), 11 Centr. Rep. 308, that this enactment had no effect upon the rule as to repeal by implication by a later statute covering the whole subject matter. Comp. §§ 191, 201.]

(a) *R. v. Smith*, L. R. 8 Q. B. 146. *Comp. Bird v. Adcock*, 47 L. J. M. C. 123.

(b) *R. v. Stepney*, L. R. 9 Q. B. 383.

(c) *Per Blackburn, J.*, *Ib.* See *R. v. Lewes*, L. R. 10 Q. B. 579. [See ante, § 233.]

<sup>104</sup> *Kugler's App.*, 55 Pa. St. 123, 125. See *infra*, note 108.

held that these might include laws passed subsequently to that act.<sup>105</sup> It may be added here, that it has been declared that a reference statute embraces only the general, not the particular powers granted by the statute referred to;<sup>106</sup> that a term referred to must be understood in its primary sense, as expressly defined, and not in an assimilated interpretation, especially where such express meaning will accomplish the full design of the framers;<sup>107</sup> but that, on the other hand, where the provisions of a statute passed with special reference to a particular subject are, by another statute, in general terms, applied to another and in its nature essentially different subject, the terms so incorporated are to be construed in such manner as to be appropriate to the new subject-matter, and the adoption extends only to such provisions of the original statute as are applicable and appropriate to the same.<sup>108</sup>

§ 494. **Non-user has not Effect of Repeal.**—A law is not repealed by becoming obsolete (*a*). Thus, trial by battle, with its oaths denying resort to enchantment, sorcery, or witchcraft, by which the law of God might be depressed and the law of the devil exalted (*b*), though the trial by grand assize, introduced in the time of Henry 2, had practically superseded it for centuries, was still in force in 1819 (*c*). The writ of attain against jurors for a false verdict was not abolished until 1825 (*d*). Until 1789, the sentence on women for treason and husband-murder was burning alive; though in practice ladies of distinction were usually beheaded, while those of inferior rank were strangled before the fire reached

<sup>105</sup> Harris v. White, 81 N. Y. 532.

<sup>106</sup> Exp. Greene, 29 Ala. 53.

<sup>107</sup> Cruger v. Cruger, 5 Barb. (N. Y.) 235.

<sup>108</sup> Jones v. Dexter, 8 Fla. 276. An adoption of the provisions of the "law" on a particular subject is broader and more general than "act." Ib. In this particular case, an act adopting the provisions of the law regulating descents as furnishing the rule for the distribution of personal property, was held intended to refer to any law of descent which might be in force

at the time the right to distribution might become vested. See ante, §§ 102, 108, 493.

(*a*) White v. Boot, 2 T. R. 274; *per* Hullock, J., in Tyson v. Thomas, McCl. & Y. 127; *per* Lord Kenyon in Leigh v. Kent, 3 T. R. 362; R. v. Wells, 4 Dowl. 562; The India, 33 L. J. P. M. & A. 193; Hibbert v. Purchas, L. R. 3 P. C. 650.

(*b*) 2 Hale, P. C. 233; 3 Bl. Comm. 337.

(*c*) 59 Geo. 3, c. 46. Ashford v. Thornton, 1 B. & A. 405.

(*d*) 6 Geo. 4, c. 50, s. 60.

them (*a*). Drawing and quartering was still part of the sentence for that offence until 1870. Until 1844, it was an indictable offence to sell corn in the sheaf before it had been thrashed out and measured (*b*); an Irish Act (28 Eliz. c. 2), against witchcraft, was still in force in 1821 (*c*); and, as late as 1836, insolvents in Scotland were bound to wear a coat and cap half yellow and half brown (*d*). Eavesdroppers, or such as listen under walls or windows or the eaves of a house, to hearken after discourse, and thereupon to frame slanderous and mischievous tales, are still liable to fine (*e*). A common scold seems still subject to be placed in a certain engine of correction called the trebucket or cucking-stool, or ducking-stool, and, when placed therein, to be plunged in the water for her punishment (*f*). To destroy any of the Queen's victualling stores appears to be still a capital offence (*g*). It is still a temporal and indictable offence to deny the being or providence of the Almighty, or, if the offender was educated in, or ever professed the Christian religion, to deny its truth, or the divine authority of the Holy Scriptures (*h*).

[The same principle is recognized in America.<sup>109</sup> Nor can a statute, *e. g.*, of limitations, be suspended by and during the progress of a war, without legislation to that effect.<sup>110</sup>]

§ 495. **Qualification of this Rule.**—But as usage is a good interpreter of laws, so non-usage lays an antiquated Act open to any construction weakening, or even nullifying its effect (*i*). [It is probably in this sense that it may be true that long non-user may repeal an act, especially where the

(*a*) 3 Inst. 211; Fost. Cr. L. 268.

(*b*) 3 Inst. 197; 7 & 8 Vict. c. 24.

(*c*) 1 & 2 Geo. 4, c. 18.

(*d*) 6 & 7 W. 4, c. 56, s. 18.

(*e*) 2 Hawk. c. 10, s. 58, 4 Bl. Comm. 166; Burn's, J., Eavesdroppers. [See Com'th v. Lovett, 4 Clark (Pa.) 5.]

(*f*) 1 Hawk. c. 75, s. 14, 4 Bl. Comm. 168; Burn's, J., Nuisance, s. 4. See *infra*, note 115.

(*g*) 12 Geo. 3, c. 24, s. 1; see Mr. Gorst's speech in H. of Com., 8th March, 1882.

(*h*) 9 & 10 W. & M. c. 32. See, also, Mr. Justice Stephen's Hist.

Crim. L., Vol. 2, pp. 459, 483, 493.

<sup>109</sup> See *Kitchen v. Smith*, 101 Pa. St. 452; *Homer v. Com'th*, 106 Id. 221; *Com'th v. Hoover*, 1 Bro. (Pa.) 25; Bish., Wr. L., § 149. Comp., however, *infra*.

<sup>110</sup> *Zacharie v. Godfrey*, 50 Ill. 186; *Smith v. Stewart*, 21 La. An. 67. The partial obliteration of the enacting clause by mutilation, not appearing to be done by legislative authority, will not defeat an act regularly passed: *State v. Wright*, 14 Oreg. 365.

(*i*) See *ex. gr. Leigh v. Kent*, 3 T. R. 364.

current of legislation shows that the Legislature regarded it as no longer in force."<sup>111</sup>] And penal laws, if they have been sleepers of long, or if they be grown unfit for the present time, should be, by wise judges, confined in the execution (*a*). [Thus, it is said, an act may become inoperative from non-user or disuse of the punishment prescribed ;<sup>112</sup> and it has already been seen that a change of circumstances may lead the court to construe provisions as directory which might otherwise not be so;<sup>113</sup> and that a course of legislation rendering certain provisions of statutes purposeless may practically render them inoperative,<sup>114</sup> "when their objects vanish or their reason ceases."<sup>115</sup>]

§ 496. **Commencement of Statutes. Ancient Rule.**—Down to the reign of Henry 7, the statutes passed in a session were sent to the sheriff of every county with a writ, requiring him to proclaim them throughout his bailiwick, and to see to their observance. Some Acts (the Triennial Act of 1641, for example,) contained a section requiring that they should be read yearly at sessions and assizes. But proclamation, or any other form of promulgation, was never necessary to their operation (*b*). Everyone is bound to take notice of that which is done in Parliament. As soon as the Parliament has concluded anything, the law intends that every person has notice of it; for the Parliament represents the body of the whole realm, and therefore it never was requisite that any proclamation should be made; the statute took effect before (*c*).

<sup>111</sup> *Hill v. Smith*, 1 Morr. (La.) 70. See, also, *Watson v. Blaylock*, 2 Mill (S. C.) 351; *Canady v. George*, 6 Rich. Eq. (S. C.) 103, as recognizing a repeal by non-user.

(*a*) Lord Bacon, *Essay on Judicature*.

<sup>112</sup> *O'Hanlon v. Myers*, 10 Rich. L. (S. C.) 128. But see *James v. Com'th*, 12 Serg. & R. 220.

<sup>113</sup> *Rodebaugh v. Sanks*, 2 Watts (Pa.) 9, ante, § 85, note 106.

<sup>114</sup> Ante, § 209. See, also, *Bish., Wr. L.*, § 149.

<sup>115</sup> *James v. Com'th*, 12 Serg. & R. (Pa.) 220, 228; where it was held, that, whilst a common scold

remained indictable in Pennsylvania (See, also, *Com'th v. Mohn*, 52 Pa. St. 243), the ducking-stool was no longer the punishment for her offence, but fine or fine and imprisonment at the discretion of the court.

(*b*) In France, a law takes effect only from the date of its insertion in the *Bulletin des Lois*. See *R. v. Mackenzie*, L. R. 1 P. C. 449. In ancient Rome, a *Senatus consultum* had no force till deposited in the Treasury: *Livy*, 39, 4; *Suet. Aug.* 94.

(*c*) *Per Thorpe*, C. J. (39 Ed. 3), cited in 4 Inst. 26.

§ 497. A statute takes effect from the first moment of the day on which it is passed,<sup>116</sup> unless another day be expressly named, [and then, from the first instant of the day named.<sup>117</sup>] By a fiction of law, however, the whole session was supposed to be held on its first day, and to last only that one day; and every Act, if no other day was expressly fixed for the beginning of its operation, took effect, by relation, from the first day of the session.<sup>118</sup> It followed, that, if a statute, passed on the last day of the session, made a previously innocent act criminal or even capital (*a*), all who had been doing it during the session, while it was still innocent and inoffensive, were liable to suffer the punishment prescribed by the statute (*b*).

§ 498. **Modern Rule. Fractions of Day.**—But, to abolish a fiction so flatly absurd and unjust (*c*), the 33 Geo. 3, c. 13, enacted that the clerk of Parliament should indorse on every Act, immediately after its title, the date of its passing and receiving the royal assent. This indorsement is part of the Act and is the date of its commencement, when no other time is provided. But where a particular day is named for its commencement, but the royal assent is not given till a later day, the Act would come into operation only on the later day (*d*).

<sup>116</sup> By the "passage" of an act is meant the conclusion of all the constitutional forms and ceremonies requisite to make the act a law, including the signature of the executive: *Wartman v. Philadelphia*, 33 Pa. St. 202; *Hill v. State*, 5 Lea (Tenn.) 725; and see, also, *State v. The Banks*, 12 Rich. L. (S. C.) 609; or, where it is not appended, the final passage of the act over a veto, or the date when the bill becomes a law by expiration of the period allowed the executive by the constitution for its return: *Logan v. State*, 3 Heisk. (Tenn.) 442. Sometimes, however, it will be construed to mean the date of its taking effect; see *Charles v. Lamberson*, 1 Iowa, 435, ante, § 489; also §§ 181, 272.

<sup>117</sup> *Tomlinson v. Bullock*, L. R. 4 Q. B. D. 230.

<sup>118</sup> *Hamlet v. Taylor*, 5 Jones L.

(N. C.) 36; *Smith v. Smith*, Mart. (N. C.) 26; *Weeks v. Weeks*, 5 Ired. Eq. (N. C.) 111. See this case, ante, § 489, note 91.

(*a*) See ex. gr. *R. v. Thurston*, 1 Lev. 91; *R. v. Bailey*, 1 R. & R. 1.

(*b*) 4 Inst. 25; 1 Bl. Comm. 70, note by Christian; *Atty-Genl. v. Panter*, 6 Bro. P. C. 486; *Latless v. Patten*, 4 T. R. 660; and the authorities cited in 1 Plowd. 79a. See the *Brig Ann*, 1 Gallison, 62.

(*c*) 1 Bl. Comm. 70n.

(*d*) *Burn v. Carvalho*, 4 Nev. & M. 893. When a Bill to continue an Act which is to expire in the same session does not receive the royal assent until the Act has expired, the continuing Act takes effect from the date of the expiration; except that it does not affect any person with any punishment for any breach of the Act between



[In this country, an act takes effect, generally, and where no other time is fixed by constitution, general law, or the particular statute itself, from the time of its passage.<sup>119</sup> And in such case,<sup>120</sup> as well as where it is passed to take effect upon, or from and after, its passage, it is said to be in force the whole of the day upon which it was finally passed.<sup>121</sup> On the other hand, where an act was to take effect "from and after" its passage, the day of passage has been held excluded.<sup>122</sup> Or that phrase has been held to give the statute operation at the very moment of its approval, and to permit, in order to determine a right, *e. g.*, to an office, an inquiry into that particular moment.<sup>123</sup> And in general, it has been asserted, that the fiction that an act goes into effect on the first instant of a day must give way to considerations of justice and convenience, and the presumption against retroaction;<sup>124</sup> as where the act imposes penalties,<sup>125</sup> or ousts an established jurisdiction.<sup>126</sup>

the expiration of the earlier and the passing of the later Act: 48 Geo. 3, c. 106.

<sup>119</sup> The word "passage" being understood in the sense above indicated: ante, § 496, note 116, and the act, in the interval between its final adoption by the Legislature and approval by, or passage over the veto of, the executive or the expiration of the time allowed him for its return, having no effect upon transactions occurring during that period: *Wartman v. Philadelphia*, 33 Pa. St. 202; but see contra: *Dyer v. State*, 1 Meigs (Tenn.) 237. As authority for the statement in the text, see, among other cases: *Matthew v. Zane*, 7 Wheat. 164; *The Ann*, Gall. 62; *Johnson v. Merchandize*, 2 Paine, 601; *Re Currier*, 13 Bankr. Reg. 208; 13 Biss. 208; *Salmon v. Burgess*, 1 Hugh. 356; *Re Wynne*, Chase Dec. 227; *Re Richardson*, 2 Story, 571; *U. S. v. Williams*, 1 Paine, 261; *Goodsell v. Boynton*, 2 Ill. 555; (also as to Illinois: *Hickory v. Ellery*, 103 U. S. 423;) *Temple v. Hays*, 1 Morr. (Ia.) 9; *Kennedy v. Palmer*, 6 Gray (Mass.) 316; *Branch B'k v. Murphy*, 8 Ala. 119; *Rathbone v. Bradford*, 1 Id. 312; *State v. Click*, 2 Id. 26; *Taylor v. State*, 31 Id. 383; *Parkinson v.*

*State*, 14 Md. 184; *Heard v. Heard*, 8 Ga. 380; *Smets v. Weathersbee*, R. M. Charit. (Ga.) 537; *State v. The Banks*, 12 Rich. L. (S. C.) 609; *Hill v. State*, 5 Lea (Tenn.) 725; *Dyer v. State*, 1 Meigs (Tenn.) 237 (by relation to the date of its passage); *Memphis v. U. S.*, 97 U. S. 293; *Bish., Wr. L.*, § 28, and cases there cited.

<sup>120</sup> See *Re Williams*, 6 Biss. 233; *Re Currier*, 13 Id. 208; *Re Howes*, 21 Vt. 619.

<sup>121</sup> *Arnold v. U. S.*, 9 Cranch 104; *Weed v. Snow*, 3 McLean, 265; *Wood v. Fort*, 43 Ala. 641; *Re Welman*, 20 Vt. 653; *Arrow-smith v. Hamering*, 39 Ohio St. 573; *Mallory v. Hiles*, 4 Metc. (Ky.) 53; *Re Currier*, 13 Bankr. Reg. 208, and other cases, *supra*.

<sup>122</sup> *King v. Moore*, Jeff. (Va.) 9; and see *Koltenbrock v. Cracraft*, 36 Ohio St. 584. See, also, *Bassett v. U. S.*, 2 Ct. of Cl. 448, as to "at the date" of passage.

<sup>123</sup> *People v. Clark*, 1 Cal. 406.

<sup>124</sup> See *Re Richardson*, 2 Story, 571; *The Ann*, Gall. 62; *Re Wynne*, Char. Dec. 227; *Re Ankrim*, 3 McLean, 285, and cases *infra*.

<sup>125</sup> *Salmon v. Burgess*, 1 Hugh. 356; *aff'd* 97 U. S. 381.

<sup>126</sup> *Kennedy v. Palmer*, 6 Gray

§ 499. **Postponement of Operation.**—[An act may be passed to take effect not only at a future day certain,<sup>127</sup> but also upon the happening of a future contingency.<sup>128</sup> In the former case, the act takes immediate effect on the day fixed;<sup>129</sup> in the latter case, where an act directed a vote to be taken “after the present war is over,” it was held to go into effect only after the proclamation of the President of the United States declaring the war at an end (Aug. 20, 1866), and a vote taken before that date was held a nullity.<sup>130</sup> Where an act was passed amending a city charter, but providing that certain sections should not take effect until approved by the corporation, the proviso was held to operate merely as a suspension of the operation of the act, but the act itself was deemed a valid law immediately upon its passage and executive approval.<sup>131</sup> And until the day when an act is to take effect arrives, the law has no force,<sup>132</sup> even as notice to the persons to be affected by it.<sup>133</sup>

§ 500. **Repugnant Acts Passed Same Day.**—[Where statutes are held to go into effect at the first moment of the day of their passage, two acts passed on the same day are passed at the same time;<sup>134</sup> and if repugnant, would, therefore, nullify each other.<sup>135</sup> If, however, of two such acts, one is to take effect immediately, and the other upon a future day, both being amendments of a general body of statutes, the act

(Mass.) 316. And see *The Cotton Planter*, 1 Paine, 23; *The Enterprise*, Id. 32, that acts of congress imposing penalties are operative in the various collection districts from receipt of the act or notice thereof by the collector from the proper department. See, on this subject, as to which no rule can be said to be firmly established, *Bish. Wr. L.*, §§ 27–31.

<sup>127</sup> *Sanders v. Com'th*, 20 W. N. C. (Pa.) 226.

<sup>128</sup> *Lothrop v. Stedman*, 43 Conn. 583; *The Aurora*, 7 Cranch, 382.

<sup>129</sup> *Rice v. Ruddiman*, 10 Mich. 125; ante, § 496.

<sup>130</sup> *Conley v. Calhoun Co.*, 2 W. Va. 417.

<sup>131</sup> *Clarke v. Rochester*, 24 Barb. N. Y.) 446.

<sup>132</sup> *Price v. Hopkin*, 13 Mich. 318. Consequently, in a statute to take effect on a future day, a provision, *e. g.*, for an election, to take place on an earlier day is a nullity: *People v. Johnson*, 6 Cal. 673.

<sup>133</sup> 13 Mich. 318. Where an act passed in 1854, to take effect in 1856, made an act punishable, a person, who, in 1855, did the thing so prohibited, could not be punished under the law: *Stare v. Bond*, 4 Jones L. (N. C.) 9.

<sup>134</sup> *Harrington v. Harrington*, 53 Vt. 649.

<sup>135</sup> See *State v. Heidorn*, 74 Mo. 410. *Comp. Metrop. B'd of Health v. Schmades*, 10 Abb Pr. N. S. (N. Y.) 205.

taking effect last, is an amendment of that body as amended by the one taking effect first.<sup>136</sup>

§ 501. **What Acts are Judicially Noticed.**—[One of the matters upon which, though the statute be silent, the Legislature must be understood to have had an intention, is that of the manner in which notice is to be taken by the courts of the passage, tenor and time of taking effect of the enactment. In the case of a public law, which “must be taken to have been passed for the public advantage,”<sup>137</sup> it is obvious, and therefore the universal rule, that, in order effectually to serve that purpose, it must be noticed as to all the particulars mentioned, and applied by the courts without being pleaded, proved, or even called to their attention.<sup>138</sup> On the other hand, no such considerations require the judicial notice of private statutes, which are passed, not for the public advantage, but for the benefit of those who obtain their enactment.<sup>139</sup> In general, therefore, private statutes are not held to imply a requirement of judicial notice, and the rule is the contrary of that stated as to public acts.<sup>140</sup> In England,

<sup>136</sup> *Harrington v. Harrington*, supra.

<sup>137</sup> *Altrincham Union v. Cheshire Lines Committee*, L. R. 15 Q. B. D. 597, 603.

<sup>138</sup> See *U. S. v. Harries*, 2 Bond, 211; *People v. Herkimer*, 4 Cow. 345; *Ross v. Reddick*, 2 Ill. 73; *Pierson v. Baird*, 2 Greene (Ia.) 235; *Griswold v. Gallop*, 23 Conn. 208; *Horn v. R. R. Co.*, 38 Wis. 463; *Berliner v. Waterloo*, 14 Id. 378; *Canal Co. v. R. R. Co.*, 4 Gill & J. (Md.) 1; *Hammond v. Inloes*, 4 Md. 138; *State v. Jarrett*, 17 Id. 309; *Div'n of Howard Co.*, 15 Kan. 194; *Lane v. Harris*, 16 Ga. 217 (together with the facts they recite); *State v. Bailey*, 16 Ind. 46; *Heaston v. R. R. Co.*, Id. 275; *People v. Hopt*, 3 Utah, 396; *Bish., Wr. L.*, § 37, and cases infra. Upon the principle that joint resolutions of the Legislature are to be regarded as of equal dignity with formal statutes: *Swann v. Buck*, 40 Miss. 268, it would seem that a joint resolution of a public character, *e. g.*, imposing a particular duty upon a state officer,

should also be judicially noticed: *State v. Delesdenier*, 7 Tex. 76. But see *Simmons v. Jacobs*, 52 Me. 147, where it was said that courts do not ordinarily take notice of the resolves of the Legislature, unless produced in evidence, *e. g.*, a resolve making up the pay-roll of the Legislature, which declared that the session commenced on a certain day and ended on another specified day. The court, however, in that case, treated the resolve as recognized. That resolutions of municipal councils, at least so far as they require action by the executive in order to be carried into effect, are subject to the same rules and formalities, including liability to veto, as ordinances, see: *Sower v. Philadelphia*, 25 Pa. St. 231; *Kepner v. Com'th*, 40 Id. 124; *Wain v. Philadelphia*, 99 Id. 330.

<sup>139</sup> *Altrincham Union v. Cheshire Lines Committee*, *ubi supra*.

<sup>140</sup> See *Bretz v. New York, 6 Robt. (N. Y.) 325*; *Broad Str. Hotel Co. v. Weaver*, 57 Ala. 26; *Perdicaris v. Bridge Co.*, 29 N. J.

indeed,] every statute passed since 1850 is a public Act and judicially noticed, unless the contrary be provided in the statute (a); [and a similar rule exists by virtue of statutory enactment in some of the states of the Union.<sup>141</sup>]

§ 502. **What are Public Acts.**—[The general rule concerning judicial notice being as stated, in respect of public and private statutes, a question frequently arises as to what is and what is not to be deemed a public statute, and as such entitled to judicial notice. ( A public statute is said to be such a one as affects the public at large, whether throughout the entire state, or within the limits of a particular locality,<sup>142</sup> and whether its operation is designed to be perpetual, or merely temporary.<sup>143</sup> A private statute, on the other hand, is one that relates to or concerns a particular person by name,<sup>144</sup> or something in which certain individuals or classes of persons are interested in a manner peculiar to themselves, and not common to the entire community.<sup>145</sup> ) It follows that a statute may be perpetual in its operation, and yet be a private statute;<sup>146</sup> whilst another may be temporary<sup>147</sup> and local in its operation, and yet be a public statute,<sup>148</sup> if, with-

L. 367; *Black v. Del.*, etc., Canal Co., 24 N. J. Eq. 455, 480; *Allegheny v. Nelson*, 25 Pa. St. 332; *Handy v. R. R. Co.*, 1 Phila. (Pa.) 31; *Com'th v. Co. Comm'rs*, 1 Pittsb. (Pa.) 249; *Workingmen's B'k v. Converse*, 33 La. An. 963; *Horn v. R. R. Co.*, 38 Wis. 463; *Atchison*, etc., R. R. Co. v. *Blackshire*, 10 Kan. 477; *Legrand v. Sidney Coll.*, 5 Mumf. (Va.) 324; *Hailes v. State*, 9 Tex. App. 170; *Bish.*, Wr. L., § 37, and cases *infra*.

(a) 13 & 14 Vict., c. 21, s. 7.

<sup>141</sup> See *Div'n of Howard Co.*, 15 Kan. 194; *Collier v. Baptist Soc'y*, 8 B. Mon. (Ky.) 68; *Halbert v. Skyles*, 1 Marsh. (Ky.) 369; *Somerville v. Winbush*, 7 Gratt. (Va.) 205; *Hart v. R. R. Co.*, 6 W. Va. 336. In *Somerville v. Winbush*, *supra*, it was decided that the statute requiring the appellate court to take judicial notice of private or local acts applied in cases decided below before as well as after the enactment.

<sup>142</sup> *State v. Chambers*, 93 N. C. 600; *Bish.*, Wr. L., § 42a; and cases *infra*.

<sup>143</sup> *People v. Wright*, 70 Ill. 388.

<sup>144</sup> See *Montague v. State*, 54 Md. 481.

<sup>145</sup> *State v. Chambers*, *supra*; and see *Bish.*, Wr. L., *ubi supra*.

<sup>146</sup> *People v. Wright*, *supra*.

<sup>147</sup> *Ibid*.

<sup>148</sup> In this sense, the phrases "public" and "general," as applied to statutes, (*e. g.* in a provision that no general law shall be in force until published,) are synonymous: *Clark v. Janesville*, 10 Wis. 186. But they are not so as contra-distinguished from "local" or "special." A law may be obnoxious to a constitutional prohibition against special or local legislation, *i. e.*, as not being "general" legislation, which, if valid, would be entitled to judicial notice as a public law. See, upon this subject, *post*, § 507, note, and § 521, note.

in the limits, as to time and territory, of its operation, it applies to and affects all persons, *i. e.*, the public, and not merely certain persons or classes of persons or interests.<sup>149</sup> Of this kind of public statutes are those which prohibit the sale of liquors, generally, or on certain days, in certain counties or parts of the state,<sup>150</sup> or within a designated distance of a certain locality;<sup>151</sup> establishing a metropolitan sanitary district and punishing violations of its provisions;<sup>152</sup> relating to the common schools of a certain section of the state;<sup>153</sup> providing for the laying out and sale of lands belonging to the state;<sup>154</sup> and pre-eminently, statutes concerning the administration of public justice, in which, though local in their application, or respecting courts of limited jurisdiction, all persons are interested, and by which all may be affected.<sup>155</sup> Such was held to be an act relating to justice's courts in a certain city;<sup>156</sup> an act requiring suits against a designated municipality to be brought in a particular court exclusively;<sup>157</sup> an act conferring on a certain county court jurisdiction equal to and concurrent with the circuit court for all sums not exceeding a specified amount;<sup>158</sup> an act changing the time for the holding of court in a particular county;<sup>159</sup> and an act providing that all judicial sales in a certain county, except in specified cases, should be made by the sheriff, and prescribing his fees upon sales on foreclosure.<sup>160</sup> An act

<sup>149</sup> *Burnham v. Acton*, 4 Abb. Pr. N. S. (N. Y.) 1; 35 How. Pr. 48; *Pierce v. Kimball*, 9 Gr. (Me.) 54; *Levy v. State*, 6 Ind. 281; and cases *infra*.

<sup>150</sup> *Ibid.*; *Van Swartow v. Com'th*, 24 Pa. St. 131. A local option law was, in *Exp. Lynn*, 19 Tex. App. 293, said to be "in one sense" a general law, but, as its operation was necessarily local to the counties, etc., that might adopt it, in this sense a special law, with the effect of setting aside and during its operation repealing all laws and regulations in conflict with it, so that an unexpired license granted under the law previously in force was no defence to a prosecution for violation of the local option law.

<sup>151</sup> *State v. Chambers*, 93 N. C. 600: in this case 2 miles.

<sup>152</sup> *Burnham v. Acton*, 4 Abb. Pr. N. S. (N. Y.) 1; 35 How. Pr. 48.

<sup>153</sup> *Bevens v. Baxter*, 23 Ark. 387.

<sup>154</sup> *West v. Blake*, 4 Blackf. (Ind.) 234.

<sup>155</sup> *People v. Davis*, 61 Barb. (N. Y.) 456, and cases *infra*.

<sup>156</sup> *Re Walker*, 1 Edw. Sel. Cas. (N. Y.) 575.

<sup>157</sup> *Bretz v. New York*, 6 Robt. (N. Y.) 325; *Same v. Same*, 4 Abb. Pr. N. S. (N. Y.) 258; 35 How. Pr. 130; *McLain v. New York*, 3 Daly (N. Y.) 32.

<sup>158</sup> *Meshke v. Van Doren*, 16 Wis. 319.

<sup>159</sup> *Price v. White*, 27 Mo. 275.

<sup>160</sup> *Kerrigan v. Force*, 16 N. Y. Supr. Ct. 185. But see *State v. Judges of C. P.*, 21 Ohio St. 1, as to an act regulating the amount of

legalizing elections previously held in a county on the question of issuing bonds in aid of certain railroads, and authorizing townships on or near the line of a particular railroad, to subscribe to its stock and issue bonds therefor, was held a public act, inasmuch as it "affects not only the people of the county [referred to] and of many of the townships of all the counties lying on or near the line of the railroad designated, but also all persons to whose hands the bonds issued by the county and township mentioned may come."<sup>161</sup> Again, laws relating to the political subdivisions of the state government are public laws, as acts defining the boundaries of counties;<sup>162</sup> prescribing the limits of counties and towns;<sup>163</sup> incorporating cities<sup>164</sup> and public corporations generally,<sup>165</sup> and annexing one part of a town to another.<sup>166</sup> So, an act creating a reservation, with the fact that the whole of a certain county fell within the limits of the same, was judicially noticed.<sup>167</sup>

§ 503. **What are Private Acts.**—[On the other hand, statutes concerning particular persons or the distinctive interests of individuals or classes, peculiar to them and not shared by

compensation attached to local offices in a certain county. In *Den v. Helmes*, 3 N. J. L. \*1050 (2 Penn. 600) an act taxing bank stock, enumerating all the banks then in the state, and giving a power of sale in default of payment was held to be clearly a public, not a private act. And it was also said, p. \*1061 (610): "It is true that statutes giving a new power of jurisdiction, must, in general, be strictly pursued. But there is a still higher rule,—that all acts made pro bono publico, are to have a liberal construction."

<sup>161</sup> *Unity v. Burrage*, 103 U. S. 447, 455, and this irrespectively of the provision declaring the act a public one. See, also, *Walnut v. Wade*, Id. 683. *Comp. Sherman Co. v. Simons*, 109 Id. 735, holding an act authorizing a county to issue bonds for the payment of an existing debt a general act. But see *Luling v. Racine*, 1 Biss. 314, as to an act authorizing a city to issue bonds.

<sup>162</sup> *Ross v. Reddick*, 2 Ill 73.

<sup>163</sup> *Stephenson v. Doe*, 8 Blackf. (Ind.) 508; and see, *Com'th v. Springfield*, 7 Mass. 9.

<sup>164</sup> *Loper v. St. Louis*, 1 Mo. 681; a city charter being a general, in the sense of a public, law: *Clark v. Janesville*, supra, note 148. That the courts of a state will take judicial cognizance of the charters and charter powers of municipalities established within the same, see: *Fauntleroy v. Hannibal*, 1 Dill. 118; *Stier v. Oskaloosa*, 41 Iowa. 353; *Case v. Mobile*, 30 Ala. 538; *Payne v. Treadwell*, 16 Cal. 220; *Winooski v. Gokey*, 49 Vt. 282; *Terry v. Milwaukee*, 15 Wis. 490; *State v. Sherman*, 42 Mo. 210; *Prell v. McDonald*, 7 Kan. 426; and of the existence of cities whether by charter or by prescription: *Den v. Helmes*, supra.

<sup>165</sup> *Portsmouth Livery Co. v. Watson*, 10 Mass. 91.

<sup>166</sup> *New Portland v. New Vineyard*, 16 Me. 69.

<sup>167</sup> *Wright v. Hawkins*, 28 Tex. 452,—the Miss. & Pac. R. R. reservation.

the public,<sup>168</sup> and consequently charters of private corporations,<sup>169</sup> and amendments to their charters, are private acts, not, in general, judicially noticed by the courts.<sup>170</sup> But this rule may be, and in some of the states of the Union is, superseded by statutory rules requiring the judicial notice of acts of incorporation in general;<sup>171</sup> and it is inapplicable where the corporation is created by a public statute.<sup>172</sup> This cognizance, however, extends only to corporations of the state to which the court belongs, not to foreign corporations;<sup>173</sup> and where a statute required the courts of the county in which the articles of association of a corporation were recorded to take judicial notice of its corporate existence, it was held that this requirement did not extend to the appellate court.<sup>174</sup>

<sup>168</sup> Supra, § 502, and cases there cited.

<sup>169</sup> Nor do courts, as a rule, judicially notice the existence of private corporations under a general law, or the existence, nature or extent of the powers granted them by special charter or other special enactment: see cases in next note. But in *Den v. Helmes*, supra, it was stated, at p. \*1057 (606), that courts will notice the recognition, contained in various acts of the Legislature, of the existence of a private corporation, in that case a bank.

<sup>170</sup> See *U. S. B'k v. Stearns*, 15 Wend. (N. Y.) 314; *Portsmouth Livery Co. v. Watson*, 10 Mass. 91, 92; *Montgomery v. Plank Road Co.*, 31 Ala. 76; *Drake v. Flewellen*, 33 Id. 106; *Perry v. R. R. Co.*, 55 Id. 413; *Perdicaris v. Bridge Co.*, 29 N. J. L. 367; *Clarion B'k v. Gruber*, 87 Pa. St. 468; *Timlow v. R. R. Co.*, 99 Id. 284; *Mandere v. Bessignore*, 28 La. An. 415; *Butler v. Robinson*, 75 Mo. 192; *Carrow v. Bridge Co.*, Phill. L. (N. C.) 118. Nor will the court notice under which of several general statutes any particular private corporation was organized, or whether it has adopted the provisions of some other general act: *Danville, etc., Co. v. State*, 16 Ind. 456.

<sup>171</sup> See *Durham v. Daniels*, 2 Greene, (Ia.) 518; *State v. Mc-*

*Allister*, 24 Me. 139; *Balt., etc., R. R. Co. v. Sherman*, 30 Gratt. (Va.) 602.

<sup>172</sup> *Covingt. Drawbr. Co. v. Shepherd*, 20 How. 227. And see *Young v. Bank*, 4 Cranch, 384, where the act incorporating the Alexandria bank, being printed and bound up with public acts, in a volume purporting to give public acts, was held to be such and entitled to judicial notice. So, in *Hall v. Brown*, 58 N. H. 93, it was held the court might notice a railway charter published by the state among the public and private acts and resolutions of the Legislature as required by statute, and distributed in conformity with it to the state, including each justice and clerk of the court "for the use of the court." See, also as to statutes establishing, and regulating the business of Banks: *Bronson v. Wiman*, 10 Barb. (N. Y.) 406; *Buell v. Warner*, 33 Vt. 570; *Davis v. Bank*, 61 Ga. 69; *Newberry B'k v. R. R. Co.*, 9 Rich. (S. C.) 495; *Shaw v. State*, 3 Sneed (Tenn.) 86; and see *Douglas v. Branch B'k*, 19 Ala. 659; *Terry v. Bank*, 66 Ga. 177; *Feemster v. Ringo*, 5 T. B. Mon. (Ky.) 336.

<sup>173</sup> *Lewis v. B'k of Kentucky*, 40 Am. Dec. 469. But see, *State v. McCullough*, 3 Nev. 202.

<sup>174</sup> *Cicero, etc., Drain. Co. v. Craighead*, 23 Ind. 274.

§ 504. **Private Acts Requiring Judicial Notice.**—[Even in the absence of such a general statutory direction, however, a private act may become entitled to judicial notice by a legislative declaration announcing it to be, or requiring it to be, taken as a public law;<sup>175</sup> and where an act is so characterized by the Legislature, a supplement or amendment of it necessarily becomes a public law also, without any special declaration to that effect.<sup>176</sup> Again, an act will become entitled to judicial notice, which otherwise would not be so, where it is expressly recognized<sup>177</sup> and amended<sup>178</sup> by a public one; or where the act itself, *e. g.*, an act incorporating a bank, contains provisions for the forfeiture of penalties to the state, or the punishment of public offences in relation to it,<sup>179</sup> as, where it makes the larceny of the notes of a bank incorporated by it felony.<sup>180</sup> Nor is an act amending and extending the provisions of a general law over counties, not before subject to it, a private law.<sup>181</sup> Moreover, a statute, local or private in many of its provisions, may contain a section which is of a public or general character, and to be noticed as such;<sup>182</sup> and this, although its title indicates that it is a local act.<sup>183</sup>

§ 505. **Construction of Private as Compared with Public Acts.**—[The rule as to the construction of private acts, as compared with that of public acts, has been laid down, in a recent case, as follows: "In the case of a public act, you construe it keeping in view the fact that it must be taken to have been passed for the public advantage, and you apply certain fixed canons to its construction. In the case of a private act, which is obtained by persons for their own benefit, you construe more strictly provisions which they allege to be in

<sup>175</sup> See *Butler v. Robinson*, 75 Mo. 192.

<sup>176</sup> *Unity v. Burrage*, 108 U. S. 447; *State v. Bergen*, 84 N. J. L. 438; *Stephens Co. v. R. R. Co.*, 33 Id. 229.

<sup>177</sup> *Rogers' Case*, 2 Greenl. (Me.) 301; *Gordon v. Montgomery*, 19 Ind. 110.

<sup>178</sup> *Lavalle v. People*, 6 Ill. App. 157.

<sup>179</sup> *Rogers' Case*, *supra*.

<sup>180</sup> U. S. v. *Porte*, 1 Cranch C. Ct. 369.

<sup>181</sup> *Third Nat. B'k v. Seneca Falls*, 15 Fed. Rep. 783.

<sup>182</sup> *Bretz v. New York*, 4 Abb. Pr. N. S. (N. Y.) 258; 35 How. Pr. 130; *McLain v. New York*, 3 Daly (N. Y.) 32; *Allentown v. Hower*, 93 Pa. St. 332, 336.

<sup>183</sup> *McLain v. New York*, *supra*: of course, in the absence of conflicting constitutional provisions.



their favor, because the persons who obtain a private act ought to take care that it is so worded that that which they desire to obtain for themselves is plainly stated in it. But, when the construction is perfectly clear, there is no difference between the modes of construing a private act and a public act."<sup>184</sup> The statute being plain and unambiguous, whether expressed in general or limited terms, there is no room for construction and no permissible resort to extrinsic facts to arrive at any other meaning, in the case of a private statute, any more than in that of a public one;<sup>186</sup> "and, however difficult the construction of a private act may be, when once the court has arrived at the true construction, after having subjected it to the strictest criticism, the consequences are precisely the same as in the case of a public act. The moment you have arrived at the meaning of the Legislature, the effect is the same in the one case as in the other."<sup>186</sup> Even where a statute involves the elements of a compact between the state and an individual, its construction must nevertheless proceed upon the principles regulating the construction of statutes, and not upon those applicable exclusively to the construction of contracts,—the contractual features of such an enactment being something apart by themselves and to be differently construed.<sup>187</sup>

<sup>184</sup> *Altrincham Union v. Cheshire Lines Committee*, L. R. 15 Q. B. D. 597, 603, *per* Lord Esher, M. R. And see to same effect as the last clause: *Bartlett v. Morris*, 9 Port. (Ala.) 266.

<sup>186</sup> *Bartlett v. Morris*, *supra*; and see *Union Pac. R. R. Co. v. U. S.*,

10 Ct. of Cl. 559, *aff'd.*: 91 U. S. 72, holding, p. 91, that the consequences to the appellant were not to be considered.

<sup>186</sup> *Altrincham Union v. Cheshire Lines Committee*, *ubi supra*.

<sup>187</sup> *Union Pac. R. R. Co. v. U. S.*, *supra*. *Comp. Binghamton Bridge Case*, 3 Wall. 51, 74-75.

## CHAPTER XVIII.

ANALOGIES AND DIFFERENCES BETWEEN THE CONSTRUCTION OF  
STATUTES AND THAT OF CONSTITUTIONS.

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tutions.
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ions.
- § 539. Commencement. Self-executing Provisions.

§ 506. General Analogies and Differences between Statutes and Constitutions.—[The preceding parts of this work have dealt exclusively with the construction of statutes. It has not been, and is not, any part of its design to enter upon questions

of constitutional law. Yet rules for the interpretation of constitutional provisions are so often, in judicial decisions, borrowed from cases of statutory construction, and conversely, that a brief indication of the analogies and differences recognized as existing between the principles applicable to the one and those applicable to the other seems indispensable, not only to complete the view taken of the interpretation of written laws, but to point out the limits within which the decisions upon the one class of cases may, and beyond which they may not, be invoked as authority upon questions arising in the other class. In the attempt to do this, the general arrangement of the subject in the foregoing chapters will be followed in the sections of this chapter.

[In a general sense, it is undoubtedly true that a constitution is a law, differing from a statute in its paramount force in cases of conflict;<sup>1</sup> and consequently many of the rules applicable in the construction of statutes are necessarily equally so in the construction of constitutional provisions.<sup>2</sup> But the constitution differs from the statutes of a state not only in being supreme over all of them. "Such instruments deal with larger topics and are couched in broader phrase than legislative acts or private muniments. They do not undertake to define with minute precision in the manner of the latter, and hence their just interpretation is not always reached by the application of similar methods."<sup>3</sup> A constitution, which provides for the future as well as for the present,<sup>4</sup> "is to be interpreted so as to carry out the great principles of government,"<sup>5</sup> and in the accomplishment of this end, the application of arbitrary rules of construction, justifiable and necessary in the interpretation of statutes, which serve a more detailed and ephemeral purpose, is to be resorted to "with hesitation, and only with much circumspection."<sup>6</sup>

<sup>1</sup> *Daily v. Swope*, 47 Miss. 367; Bish., Wr. L., §§ 11a, 12, 16. 89, and cases cited; and post, note 12.

<sup>2</sup> Bish., Wr. L., § 92, and cases there cited; Potter's Dwarrris, 654; Sedgw., 19.

<sup>3</sup> *Houseman v. Com'th*, 100 Pa. St. 222, 232, *per Green, J.*

<sup>4</sup> *Leonard v. Com'th*, 112 Pa. St.

607, 620; *Henshaw v. Foster*, 9 Pick. (Mass.) 312, 316.

<sup>5</sup> *Com'th v. Clark*, 7 Watts & S. (Pa.) 127, 133; *Morrison v. Bachert*, 112 Pa. St. 322, 329.

<sup>6</sup> *Cooley, Const. Lim.*, 101. And see *Id.* 73, 75; *Story, Const.*, § 454.

§ 507. **Literal Construction. Technical and Popular Meaning.**— [Like other instruments, a constitution is entitled to a construction, as nearly as may be, in accordance with the intent of its makers,<sup>7</sup> who, in this case, are the people themselves.<sup>8</sup> Whilst, therefore, phrases that have acquired a settled meaning, thoroughly understood, not only in legal parlance, but in common acceptance, are to be given that significance when used in a constitution,<sup>9</sup>—such, *e. g.*, as “due process of

<sup>7</sup> *Moers v. Reading*, 21 Pa. St. 188, 200; *Hills v. Chicago*, 60 Ill. 86; *Hawkins v. Carroll Co.*, 50 Miss. 735. See *Elton v. Geissert*, 10 Phila. (Pa.) 330, *infra*, note 64, as to language, which, upon the ground of intention, was construed as abolishing an office; and *Carpenter v. People*, 8 Col. 116, where, to avoid the exclusion from a provision of a whole class expressly mentioned, the word “such” was rejected.

<sup>8</sup> See *Hills v. Chicago*, *supra*; *Beardstown v. Virginia*, 76 Ill. 34; *Manly v. State*, 7 Md. 135; *Cooley, Const. Lim.*, 68.

<sup>9</sup> *Comp. Daily v. Swope*, 47 Miss. 367, where it is said to be a safe rule to give to terms used in the constitution such meaning and application as they have received from legislative and judicial interpretation, except in cases where it is apparent that a more general or restricted sense was intended. Thus, in *Williamson v. Lane*, 52 Tex. 335, it was held that a contested election proceeding was not a “civil case” within the meaning of art. 5, § 6, of the Constitution limiting the appellate jurisdiction of the Supreme Court to such cases; (see *ante*, § 74;) nor, of course, a “suit, complaint or plea,” within art. 5, § 8, where, with those words, is coupled the clause, “when the matter in controversy shall be valued at the amount of \$500,” etc. Nor does the prohibition of art. 2, § 12, of the Illinois constitution, against imprisonment for “debt,” extend to actions for torts, nor to fines or penalties under penal laws, but only to actions upon contracts, express or implied: *Kennedy v. People (Ill.)*, 11 West Rep. 48. (*Comp. ante*, § 76). In

construing prohibitions against, or limitations upon, “local” or “special” legislation, it has been said that “a law is said to be local and special . . . not because of the . . . Constitution, or of any decision under it, but because it falls within the proper definition of a local law both before and since” the adoption of the constitution: *Evans v. Phillippi (Pa.)*, 9 Centr. Rep. 691, 693; and, consequently, in that case, as well as in *Bitting v. Com’t’h (Pa.) Id.* 693, it was held that a statute, general in form, was not to be treated as a local or special one, because its application to some portions of the state was prevented by the existence of local laws, enacted before the adoption of the constitution, unrepealed by the statute, or expressly saved by it. [*Comp. State v. Camden (N. J.)*, *Id.* 497, where a general law, in terms applying to all cities, was held to repeal a special provision formerly in force as to one: see *Burke v. Jeffries*, 20 Iowa, 145; *People v. West Chester*, 40 Hun (N. Y.) 353, *ante*, § 228; because, otherwise, the act would violate the constitutional prohibition of special legislation,—a design not to be imputed to the Legislature: *ante*, § 178; *State v. Intox. Liquors (Me.)* 5 New Engl. Rep. 852; *Stump v. Hornback (Mo.)* 6 S. West. Rep. 356.] And in *Montague v. State*, 54 Md. 481, an act adding husbands to the class of persons exempt from the operation of the collateral inheritance tax law, and making the exemption applicable to all such claims not actually paid, was held to be a public and general law, and the fact that the consideration of a particular individual’s case proba-

law," or the "law of the land," *i. e.*, the general law, the law that hears before it condemns, that proceeds upon inquiry, and renders judgment only after trial," or "ex post facto laws,"" or the word "law," which cannot properly include a local regulation, such as a city ordinance," or orders or

bly induced the enactment of the law by the Legislature was not permitted to change the character of the act. (See ante, § 31.) Again, an act amending the charter of a city was held not to be a local or private law within the meaning of Wis. Const., art. 4, § 18: *Thompson v. Milwaukee*, (Wis.) 34 N. West. Rep. 402. (See ante, § 502.) So, as to the Ill. Const., an act providing for the assessment and collection of taxes in all incorporated cities and towns of the state: *People v. Wallace*, 70 Ill. 680; and see, as to New York, with reference to a similar statute: *Ensign v. Barse*, (N. Y.) 14 N. East. Rep. 400,—and as to acts relating to the laying out, etc., of streets in cities: *Re Lexington Ave.*, 92 N. Y. 629; *Re Woolsey*, 95 Id. 135. It was, indeed, held in New York, that the exception from its operation of two out of sixty counties in the state, did not render it local: *People v. Plank Road Co.*, 86 N. Y. 1. Compare, however, *State v. Hudson Co.*, (N. J.) 9 Centr. Rep. 501, where it was held that the exception of one county rendered the act unconstitutional; and see, to same effect, *Davis v. Clark*, 15 W. N. C. (Pa.) 209; *Scranton Sch. Distr. App.*, 113 Pa. St. 176, 190.

<sup>10</sup> See *Dartmouth College v. Woodward*, 4 Wheat. 519; *Pennoyer v. Neff*, 95 U. S. 714; *McMillen v. Anderson*, Id. 37; *Pearson v. Yewdall*, Id. 294; *Davidson v. New Orleans*, 96 Id. 97; *Taylor v. Porter*, 4 Hill (N. Y.) 140; *Stuart v. Palmer*, 74 N. Y. 183; *Zeigler v. R. R. Co.*, 58 Ala. 594; *Craig v. Kline*, 65 Pa. St. 399, 413; *Palaiet's App.*, 67 Id. 479, 485; *Philadelphia v. Scott*, 81 Id. 80; *Exp. Steinman*, 95 Id. 220; *State v. Doherty*, 60 Me. 504; *State v. Allen*, 2 McCord (S. C.) 55 (but see *Fox's App.*, 112 Pa. St. 387); *South Platte Land Co. v. Buffalo*, 7 Neb. 253; *Wright v.*

*Cradlebaugh*, 3 Nev. 341; *St. Louis, etc. Ry. Co. v. Williams*, (Ark.) 5 S. West. Rep. 883; *Cooley, Tax'n*, 262; *Cooley, Const. Lim.*, 432-439. A proceeding in equity is "due process of law:" *McLane v. Leicht*, 69 Iowa, 401.

<sup>11</sup> *Cooley, Const. Lim.*, 72, 73. See, as to the meaning of the phrase, ante, § 279. See *State v. Dolan*, (Mo.) 6 S. West. Rep. 366, that an act requiring courts to take judicial notice of the population of cities according to the last enumeration, is not an ex post facto law. The prohibition against such legislation applies only to legislation concerning crimes; *Exp. Sawyer*, 124 U. S. 81 L. ed. 402.

<sup>12</sup> *Baldwin v. Philadelphia*, 99 Pa. St. 164: within the meaning of a provision that no "law" shall extend the term of a public officer, or increase or diminish his salary, etc. (Comp. post, note 33.) See *Wayne Co. v. Detroit*, 17 Mich. 390; *Fennell v. Bay City*, 36 Id. 186,—post, § 508; and comp. *Exp. Schmidt*, 24 S. C. 363, where it was held that an offence against a city ordinance is not the same as an offence under a statute, nor to be prosecuted by indictment nor tried by jury. A state constitution, however, is a "law" within the meaning of art. i., sec. x., cl. 1, of the federal constitution forbidding laws impairing the obligation of contracts: *R. R. Co. v. McClure*, 10 Wall. 511; and see *Beckman v. Skaggs*, 59 Cal. 541, post, § 523. As to the meaning of "same offence," Fifth Amendment U. S. Const., as requiring the offence to be the same both in law and in fact, see ante, § 388, *U. S. v. Cashiel*, 1 Hugh. 552. In other cases, "same" may mean not the specific, identical thing, but of a kind or species: *Craps v. Brown*, 40 Iowa, 487, 493,—as where a contract provided for drawing out of a venture "the same property" the

agreements of county commissioners,"—where a phrase has both a technical and a popular meaning, the former, which would ordinarily prevail in a statute, will be discarded for the latter in a constitutional provision.<sup>14</sup> Indeed, the language of the constitution, owing its whole force to its ratification by the people, is always to be taken in its common acceptation, its plain, ordinary, natural, untechnical sense;<sup>15</sup> unless the very nature of the subject indicates, or the context suggests, that it was used in its technical sense.<sup>16</sup> It must also be presumed that the people who adopted the constitution understood the force and extent of the language used,<sup>17</sup> and that the language has been employed with sufficient precision to convey the intent.<sup>18</sup> It follows, that, where the words of a constitutional provision, taken in their ordinary sense and in the order of their grammatical arrangement,<sup>19</sup> embody a definite meaning, which involves no absurdity or conflict with other parts of the same instrument, the meaning thus apparent on the face of the provision is the only one that can be presumed to have been intended, and there is no room for construction.<sup>20</sup> It is not allowable in a constitution, any more than in a statute, to interpret that which has no need of interpretation.<sup>21</sup> Nor, as will be seen hereafter, can the inconvenience or hardship that may ensue the

parties put in: *Brockway v. Rowley*, 66 Ill. 99. But see *Chahoon v. State*, 21 Gratt. (Va.) 822, where "similar" jurisdiction was construed to mean "same" jurisdiction.

<sup>13</sup> *Crawford Co. v. Nash*, 99 Pa. St. 253, as to officers appointed by them.

<sup>14</sup> *State v. Mace*, 5 Md. 337; *Manly v. State*, 7 Id. 135; *Weill v. Kenfield*, 54 Cal. 111. As between a meaning acquired under the jurisprudence of our country and that of another, *e. g.*, England, the former, in case of difference, is to be preferred: *The Huntress*, Dav. 82.

<sup>15</sup> *Gibbons v. Ogden*, 9 Wheat. 1, 188; *Hills v. Chicago*, 60 Ill. 86; *Beardstown v. Virginia*, 76 Id. 84; *Springfield v. Edwards*, 84 Id. 626; *Com'th v. Clark*, 7 Watts & S. (Pa.) 127; *Cronise v. Cronise*, 54 Pa. St. 255; *Page v. Allen*, 58

*Id.* 338; *Weill v. Kenfield*, 54 Cal. 111; *Manly v. State*, 7 Md. 135; *State v. Mace*, 5 Id. 337; *Green-castle Tp. v. Black*, 5 Ind. 557; *Carpenter v. People*, 8 Col. 116; *Sedgw.*, 553; *Cooley, Const. Lim.*, 71; *Bish., Wr. L.*, § 92.

<sup>16</sup> *Weill v. Kenfield*, *supra*.

<sup>17</sup> *Henshaw v. Foster*, 9 Pick. (Mass.) 312, 316.

<sup>18</sup> *Hills v. Chicago*, 60 Ill. 86; *Cooley, Const. Lim.*, 68, and cases in note 2.

<sup>19</sup> As to the inadmissibility of a transposition of clauses in the interpretation of a section of the constitution, see *Ogden v. Saunders*, 12 Wheat. 213, 267, 268.

<sup>20</sup> *Newell v. People*, 7 N. Y. 9, 97; *Hills v. Chicago*, 60 Ill. 86; *Springfield v. Edwards*, 84 Id. 626; *Cooley, Const. Lim.*, 68, 71.

<sup>21</sup> *Beardstown v. Virginia*, 76 Ill. 34.

enforcement of a provision couched in such unmistakable language, justify its modification by construction ;<sup>22</sup> and no considerations of supposed policy can be regarded in arriving at the meaning : " the whole line of this argument is disposed of by the phrase 'Ita lex scripta est.' "<sup>23</sup> " No accepted canon of construction," says the Supreme Court of Michigan, " can justify us in adding to the constitution qualifying words of our own, suggested only by outside considerations, which may or may not have been of weight with the convention in framing, or the people in adopting that instrument. "<sup>24</sup>

§ 508. [A few instances of the application of this principle of constitutional construction may not be out of place here, and may serve to illustrate its bearing and effect. A provision of the California constitution,<sup>25</sup> requiring every bill, before becoming a law, to be " read three times," unless, in case of urgency, that requisition be dispensed with by a two-thirds vote of the house, is construed as requiring, according to its plain import, that every bill, before becoming a law, shall be read at length, not only by its title, on three separate days in each house, unless, in the case of urgency, two-thirds of the house where the bill is pending shall, by a vote of yeas and nays, dispense with the provision, either as to the manner of reading, or as to the reading on separate days.<sup>26</sup> A provision of the Michigan constitution,<sup>27</sup> that " all fines assessed and collected in the several counties and townships for any breach of the penal laws shall be exclusively applied to the support of such libraries " as the Legislature is required,

<sup>22</sup> See post, § 524.

<sup>23</sup> *Weill v. Kenfield*, 54 Cal. 111, 117; *Hills v. Chicago*, supra.

<sup>24</sup> *Wayne Co. v. Detroit*, 17 Mich. 390, 401. In *People v. Squire*, (N. Y.) 10 Centr. Rep. 437, it was held that art. 3, § 17, N. Y. Const., providing that " No Act shall be passed which shall provide that any existing law, or any part thereof, shall be made or deemed a part of said act, or which shall enact that any existing law, or any part thereof, shall be applicable, except by inserting it in such act," did not apply to an act purporting to amend existing laws. Nor does

a prohibition against the appointment of a senator or representative, to any civil office, during the time for which he was elected, forbid his election to such an office : *Carpenter v. People*, 8 Col. 116.

<sup>25</sup> Art. iv, § 15.

<sup>26</sup> *Weill v. Kenfield*, supra. See, on this subject, *Cooley*, Const. Lim., 168, and compare post, § 536. But such a provision does not apply to amendments made to a bill : *People v. Wallace*, 70 Ill. 680. Comp. ante, § 191, and post, § 524.

<sup>27</sup> Art. xiii, § 12.

by a preceding clause in the same section, to establish in each township, was held to apply to such penal laws of the state as imposed punishment by fine and imprisonment,<sup>28</sup> and not to the numerous forfeitures and penalties growing out of the breaches of duty that partake of the nature of civil grievance or merely local wrong, and which do not come within the category of criminal conduct.<sup>29</sup> The word "session," in a provision of the New York constitution, authorizing the governor, when the senate was not in session, to fill vacancies in certain offices, was held to mean, not a session in its technical sense, but a present acting or being of the senate as a body; so that the senate was to be deemed not in session, within the meaning of the phrase, and the power referred to as existing in the governor, when the sittings were terminated or interrupted by a long adjournment, although, there having been no final adjournment, the session, strictly speaking, continued.<sup>30</sup> Again, it has been held that the term "municipal corporations" was not to be taken to mean quasi-municipal corporations, to the exclusion of municipal corporations generally so known.<sup>31</sup> A provision declaring disqualified from holding office and from exercising, for four years, the right of suffrage, any person, who, while a candidate for office, should violate "any election law" of the state, covers the case of one who, in such circumstances, violates a law regulating primary elections.<sup>32</sup> And in a constitutional prohibition against increasing or diminishing the salary or "emoluments" of any public officer during his term of office, the latter term was held to include any perquisite, advantage, profit, or gain arising to one from the possession of a public office; *e. g.*, where it was the official duty of a sheriff to board prisoners in the county jail, the sum secured to him by law as compensation for this

<sup>28</sup> *Wayne Co. v. Detroit*, *supra*.

<sup>29</sup> *Fennell v. Bay City*, 36 Mich. 186. But the penal provisions of a state law are not superseded by an unnecessary ordinance to the same effect: *Wayne Co. v. Detroit*, *supra*.

<sup>30</sup> *People v. Fancher*, 50 N. Y. 288.

<sup>31</sup> *Carpenter v. People*, 8 Col. 116, 125.

<sup>32</sup> *Leonard v. Com'th*, 112 Pa. St. 607.



service." A provision<sup>36</sup> that each stockholder in a corporation shall be liable, over and above the stock owned by him and the amount unpaid thereon, to a further sum equal in amount to such stock, refers not only to stock subscribed for by him, but also stock distributed to him as a dividend." The technical fiction that the entire session of a court is held on the first day thereof, does not, in a constitutional provision allowing exceptions to be taken, etc., during the whole of the "sitting," permit the reading of the latter word as synonymous with "term;" but such a provision is to be regarded merely as extending such right, ordinarily to be exercised at the time the ruling, etc., is made, during the whole remainder of the day's sitting and before adjournment for the day.<sup>37</sup>

§ 509. **External Circumstances. History. Debates.**—[It is but a corollary—applicable both to statutes and to constitutions, though perhaps more strongly to the latter—of the principle already stated, that the intent of a provision must be found in the instrument itself; that no effect can be given to an intention not expressed by its language; that the question for the interpreter is not what the framers meant, as distinguished from what the language expresses, but simply what is the meaning of the words;<sup>38</sup> that, if they convey a definite meaning, involving no absurdity, no contradiction of other parts of the instrument, that meaning, apparent on the face, is to be adopted;<sup>39</sup> and that, where the text is plain and unambiguous, courts are not at liberty, in putting an interpretation upon it, to search for its meaning beyond the instru-

<sup>36</sup> *Apple v. Crawford Co.*, 105 Pa. St. 300. *Comp. State v. Spencer*, 91 Mo. 206; *State v. Dillon*, 90 Id. 229, post, § 519. Under the 24th Amendment of the Connecticut constitution, forbidding the increase of compensation of a public officer, to take effect during his continuance in office, the vote of city councils to pay a joint standing committee for services rendered, the office of councilman being one without compensation and the services those ordinarily rendered by such a committee, was held illegal: *Garvey v.*

*Hartford*, 54 Conn. 440. But continuance in office was, in *Smith v. Waterbury*, Id. 174, declared to mean continuance under one appointment, not under a re-appointment.

<sup>37</sup> *Ohio Const.*, Art. xii, § 3.

<sup>38</sup> See *Brown v. Hitchcock*, 36 Ohio St. 667; *Aultman's App.*, 98 Pa. St. 505.

<sup>39</sup> *Costigin v. Bond*, 65 Md. 122.

<sup>37</sup> *Beardstown v. Virginia*, 76 Ill. 34.

<sup>38</sup> *Hawkins v. Carroll Co.*, 50 Miss. 735.

ment itself," or to resort, for that purpose, to extrinsic facts and circumstances."<sup>39</sup> But, as in the case of statutes, this rule extends only so far as the language of a constitutional provision is plain and unambiguous,—though, in the latter case, no ambiguity would arise from the mere fact that a phrase is susceptible of a technical as well as of a more popular meaning, the latter being ordinarily preferred,"—and where, understood in that sense, it raises no conflict with other provisions in the same instrument, and gives occasion to no absurd effect. An intention to produce such results cannot, of course, be imputed to the framers of a constitution, or to the people adopting it," any more than to the Legislature in passing a statute. And hence, to avoid them, aids in the construction of constitutional provisions are recognized as permissible, analogous to those allowed in the construction of statutes.

§ 510. [Thus, it is a sound rule of constitutional as well as statutory construction, that the previous history, the circumstances surrounding the foundation of a constitution, are to be regarded by the courts," and as part of them, to some extent, the history of the constitution itself, in the course of its preparation at the hands of the convention that framed it." The propriety, indeed, of resorting to the debates in the constitutional convention, upon the adoption of a provision under construction, has been denied." "They are of value as showing the views of individual members, and as indicating the reasons for their votes. But they give us no light as to the views of the large majority who did not talk; much less of the mass of our fellow citizens whose votes at the polls gave that instrument the force of fundamental law." It will be observed that such a reference is not strictly analogous to a reference to the journals of the Legislature, show-

<sup>39</sup> *Chesapeake, etc., R. R. Co. v. Miller*, 19 W. Va. 408.

<sup>40</sup> *Sturges v. Crowninshield*, 4 Wheat. 202, 203; *Cooley, Const. Lim.*, 68.

<sup>41</sup> See ante, §§ 507, 508.

<sup>42</sup> See *Hills v. Chicago*, 60 Ill. 86; *Hawkins v. Carroll Co.*, 50 Miss. 735; *Sturges v. Crowninshield*, supra.

<sup>43</sup> *Kennedy v. Gies*, 25 Mich. 83; *Cronise v. Cronise*, 54 Pa. St. 255, 261; *Cooley, Const. Lim.*, 80, 81. See *Allegheny Co. v. Gibson*, post, § 511.

<sup>44</sup> See *Id.* 79-81.

<sup>45</sup> *Taylor v. Taylor*, 10 Minn. 107.

<sup>46</sup> *Com'th v. Balph*, 111 Pa. St. 365, 380, per Paxson, J.

ing the various steps in the passage of a statute; but rather to a reference to the expression of opinions by individual legislators upon the signification of its enactments,"—a mode of construction, which, as to statutes, has been uniformly rejected as intolerable:<sup>48</sup> or perhaps, as, in the adoption of a constitution, the people at large must be regarded as the legislators, the relation of the convention preparing it for submission may be still more properly compared to that of a special committee of the Legislature charged with the drafting of a statute for its acceptance or rejection, and it would never be deemed legitimate to recur to the debates in the committee room as a source of the interpretation of a statute.<sup>49</sup> Yet this great stretch of principle seems, upon the whole, to be sanctioned by judicial authority, in the interpretation of constitutional provisions, the theory being, that, members of the convention having declared that a certain provision was designed to have a certain effect, and no member expressing a different view, the people voted for the constitution in the light of this construction, and therefore adopted it;<sup>50</sup> and the limit of the applicability of the rule being "that the debates are not to be resorted to when there is no room for construction;"<sup>51</sup> but where the meaning, from any cause, is in doubt, the debates may be considered;<sup>52</sup> and that even the ascertained understanding of the convention is not to be permitted to override the more natural and obvious meaning of the words, in which the people adopting the constitution must be supposed to have understood them.<sup>53</sup> Moreover, the circumstances

<sup>47</sup> See the dissenting opinion of Gibson, J., in *Eakin v. Raub*, 12 Serg. & R. (Pa.) 330, at p. 352: "A constitution, or a statute, is supposed to contain the whole will of the body from which it emanated; and I would just as soon resort to the debates in the Legislature, for the construction of an act of assembly, as to the debates in the convention, for the construction of the constitution."

<sup>48</sup> Ante, §§ 30, 31.

<sup>49</sup> Ante, §§ 32, 68. See, also, *Taylor v. Taylor*, 10 Mian. 107, *infra*.

<sup>50</sup> *Springfield v. Edwards*, 84 Ill.

626, 643.

<sup>51</sup> *I. e.*, where the text of a constitutional provision is not ambiguous: *Chesapeake, etc., R. R. Co. v. Miller*, 19 W. Va. 408. See *Pike Co. v. Rowland*, post, § 528.

<sup>52</sup> *Springfield v. Edwards*, *ubi supra*. And see *Catlin v. Smith*, 2 Serg. & R. (Pa.) 267, 272; *Fry's Election*, 71 Pa. St. 302, 306; *Morrison v. Bachert*, 112 Id. 323, 329; *Elton v. Geissert*, 10 Phila. (Pa.) 330; *Cooley, Const. Lim.*, 79, 80, and cases there cited.

<sup>53</sup> *Cooley, C. L.*, 80 (cit. *State v. Mace*, 5 Md. 337; *Manly v. State*, 7 Id. 135; *Hills v. Chicago*, 60 Ill.

attending the deliberations of a convention may be such as to preclude any consideration of them as throwing a legitimate light upon the interpretation of the constitution that finally emanated from them. Thus it was said in a case in Michigan: "If such debates could ever properly be resorted to as aids in interpretation, it seems quite obvious that such rule could not properly be followed in this case. The convention that framed the constitution divided on the first day of the session, forming two organizations, and afterward a joint committee of each reported a constitution that each wing adopted, and which is now the constitution of our state. As well might we resort to the debates in a committee room."<sup>84</sup>

§ 511. **Preamble.**—[It is evident, that, only in the most general way, can the preamble of a constitution influence the construction of its provisions. As affecting the general character of the instrument, it has, indeed, been resorted to. The weight attached to the phrase "we, the people," in the preamble of the federal constitution, and the arguments based upon it, are a familiar instance of this species of construction.<sup>85</sup> In a recent and elaborately considered case,<sup>86</sup> an argument was drawn, as to the general intent of a new constitution to abrogate previous legislation, from the different object of the first constitution adopted by the state, as shown by its preamble. "The preamble to the constitution [of 1776] recites the rights of the people and the oppressions of the crown, and declares that all allegiance and fealty to the said king and his successors are dissolved and at an end, and all power and authority derived from him, ceased in these colonies. It is not difficult to understand why this principle should be asserted in a constitution that was the outgrowth of a revolution, and of a total severance of all political relations between the colonies and the mother country. In its application to the present times we must not overlook the fact that the conditions are essentially different. The convention of 1873 was not throwing off the yoke of an oppressor and

<sup>84</sup> ; *Beardstown v. Virginia*, 76 Id. 84, all supra); *Pike Co. v. Rowland*, 94 Pa. St. 238, 249.

<sup>85</sup> *Taylor v. Taylor*, 10 Minn. 107.

<sup>86</sup> See *Martin v. Hunter's Lessee*, 1 Wheat. 304, 324.

<sup>87</sup> *Allegheny Co. v. Gibson*, 90 Pa. St. 397.

abrogating laws imposed upon the people by a parliament not in sympathy with their views, and in whose deliberations they had no voice. The convention was simply the people of the state, in a representative capacity, it is true, sitting in judgment upon their own acts, altering and modifying their own constitution to suit the progress of the age, and changing their own laws where deemed essential to the welfare of the state. To such a body, so constituted, no intention to abrogate all that had gone before can be imputed, unless such intention be clearly expressed.”<sup>57</sup>

§ 512. **Titles or Captions of Articles, etc.**—[Perhaps, even less importance is to be attributed to the titles of the various subdivisions of a constitution, than to similar features in statutes.<sup>58</sup> It is said that scarcely any significance can be attached to the wording of the captions or titles of the several articles of a constitution. “At most, they do not profess to indicate more than the general character of the articles to which they are prefixed. That they are intended as critical and precise definitions of the subject matter of the articles, or as exercising restraining limitations upon the clear expressions therein contained, cannot be pretended.”<sup>59</sup> Hence the fact that a particular article, according to its title, purports to treat of municipal officers, will not preclude an application to such of the provisions of another article referring broadly to “all officers,” “officers,” “appointed officers,” “officers elected by the people,” and “civil officers.”<sup>60</sup>

§ 513. **Schedule.**—[The schedule of a constitution is a temporary provision for the preparatory machinery necessary to put the principles of the same in motion without disorder or collision.<sup>61</sup> It forms, indeed, a part of the constitution, so far as its temporary purposes go, and to that extent is of

<sup>57</sup> *Ibid.*, at p. 406, *per Paxson, J.*

<sup>58</sup> *Ante*, §§ 69, 70, to the cases cited with which, may be added *Cook v. Fed. Life Ass'n. (Ia.)* 35 N. West. 500, where an act “relating to insurance and fire insurance companies,” but published under a heading “Relating to Fire Insurance,” was held, nevertheless to apply to all insurance companies.

<sup>59</sup> *Houseman v. Com'th*, 100 Pa. St. 222, 231, *per Green, J.*

<sup>60</sup> *Ibid.* Compare, however, *Pierce v. Com'th*, 104 Pa. St. 150, 155, and *Baldwin v. Philadelphia*, 99 Id. 164, 170, where such headings or titles were referred to, incidentally, in aid of construction.

<sup>61</sup> *Com'th v. Clark*, 7 Watts & S. (Pa.) 127, 133.

equal authority with the provisions in the body of the instrument upon the various departments of the state." But its uses are temporary and auxiliary, and its purpose is not to control the principles enunciated in the constitution itself, but to carry the whole into effect, without break or interval.<sup>68</sup> Thus, a certain section of a constitution declared that "all officers whose election or appointment is not provided for in this constitution, shall be elected or appointed as shall be directed by law." The election or appointment of canal commissioners was not provided for by the constitution, and was consequently to be provided for by law. A provision in the schedule of the constitution declared that the appointing power should remain as theretofore, and that all officers of the executive department should continue in office until the Legislature should pass the necessary laws, and appointments be made thereunder. Previously to the adoption of the constitution, the canal commissioners were appointed. They were consequently to remain in office until laws for elections and new appointments should be made. But the schedule further directed that the first Legislature, under the new constitution, should pass those laws. This the first Legislature failed to do, in consequence of a difference that took place between the senate and the house of representatives. An Act passed by a subsequent Legislature on the subject was assailed as being unconstitutional, it being claimed that the power of the Legislature to pass such an act expired with the first Legislature under the new constitution, and that consequently the right of appointment remained with the executive. It was held, however, upon the principles stated concerning the function of the schedule, that it could not control the principles or construction of the constitution itself; that, therefore, the provision as to the time when the Legislature was to exercise the power given it in the premises, must be deemed merely directory; and that the legislation referred to was consequently valid and constitutional.<sup>69</sup> Nor

<sup>68</sup> *Stewart v. Crosby*, 15 Tex. 548.

<sup>69</sup> *Com'th. v. Clark*, *supra*; *Harrison v. Courtright*, 4 Luz. L. R. g. (Pa.) 297; 7 Leg. Gaz. 406.

<sup>69</sup> *Com'th. v. Clark*, *supra*. (*Comp. Com'th. v. Leib*, 9 Watts [Pa.] 200, where it was held that the first Legislature having exercised a power of legislation

can a provision found among the temporary provisions of the schedule be given the effect of supplying permanently an omission in the body of the instrument which may have been designed and cannot be regarded as an oversight. So, where the body of the constitution contained a provision to the effect that certain designated officers should, in certain cases, hold over, and among the provisions of the schedule was found one of similar purport concerning certain other officers not included in the constitutional provision, nor in any part of the constitution permitted to hold over, it was held that the provision in the schedule was shown by its place in the same to be intended as temporary merely, as otherwise it would have been put in the body of the instrument; that its omission from the latter could not be presumed to be an oversight merely, to be supplied by a transfer of the scheduled provision; but that the enumeration of the persons in the permanent provision was rather to be treated as an exclusion of those designated in the temporary one."

conferred upon it by another section of the same schedule—that of dividing the associate judges of the common pleas courts into classes, in order that they might be displaced in turn, according to seniority of commission, in a certain number of years,—a subsequent Legislature could not remodel the classification then established on the ground of mistake; because the power was exhausted by the execution of it and was then gone, and because the later legislation would have come too late for the object, the period for the expiration of commissions of the first class having already elapsed before the second attempt at legislation was made.) And see *Elton v. Geissert*, 10 Phila. (Pa.) 330, where it was held that a provision in the schedule saving existing officers, "unless otherwise provided in this constitution," did not save the office of leather inspector, the constitution declaring that "no state office shall be continued or created for the inspection or measuring of any merchandize," etc. See *infra*, note 78.) And where art. 5, § 3, of a constitution gave the Supreme Court original jurisdiction in cer-

tain injunctions; mandamus to courts of inferior jurisdiction, and quo warranto to certain state officers, and declared that it should not exercise any other original jurisdiction; and § 11 of the schedule provided that all courts of record and all existing courts, which were not specified in the constitution, (see § 532), should continue in existence, up to a certain date without abridgment of jurisdiction; it was held that the Supreme Court retained jurisdiction in mandamus only as to courts of inferior jurisdiction: *Com'th v. Hartranft*, 77 Pa. St. 154.

<sup>65</sup> *State v. Taylor*, 15 Ohio St. 137. See, however, *Com'th v. Pattison*, 109 Pa. St. 165, where it was held that § 16 of the schedule of Pa. constitution of 1874, that "after the expiration of the term of any president judge of any court of common pleas, in commission at the adoption of this constitution, the judge of such court, learned in the law and oldest in commission, shall be the president judge thereof," applied not only to judges whose commissions were in force at the time of the adoption of the constitution, but

§ 514. **Context. Bill of Rights.**—[As in the case of a statute, so in that of a constitution, it may be regarded as at least *prima facie* true that the same, or substantially same, expression is used in the same sense wherever it occurs." It is essential, therefore, in the construction of a constitutional, as well as in that of a statutory provision, that the entire instrument be considered in order to ascertain the sense in which a particular expression is used." Thus, to illustrate by a few recent instances, a constitutional provision conferring upon the governor of the state the right and duty of filling vacancies in elective offices until the next or second succeeding "general election," as the case might be, was, by comparison of the various articles of the constitution, ascertained to mean the general election occurring in the month of November, and not to apply to offices to be filled at the February election ;<sup>68</sup> and by the same method, a provision that the judge "oldest in commission" should be president judge of a court, was found to refer to the judge oldest in continuous service.<sup>69</sup> More especially does this principle apply where the text of a provision contains expressions calling attention to, and assimilating its own phraseology to that of, other parts of the instrument. So the nature of the residence required by the constitution of Pennsylvania, in order to confer the right of voting, was at least partially determined from a comparison of various other provisions, one of which, evidently contemplating a permanent residence, by using the phrase "as aforesaid" stamped the others with the like character.<sup>70</sup> But, considering the vast variety of matters treated of in a constitution and the necessary generality of its language, the principle in question is obviously of less force and value in its application to the terms occurring in such an instrument, than in the case of a statute confined to a single subject and purpose. "In common language,

also to all judges who might be subsequently commissioned; *i. e.*, that it was of permanent, and not of merely temporary, force.

<sup>68</sup> *Moers v. Reading*, 21 Pa. St. 188, 201; *Cooley*, C. L., 74, cit. *Brien v. Williamson*, 8 Miss. 14.

<sup>69</sup> *Manly v. State*, 7 Md. 135;

*Moers v. Reading*, *supra*; *Cooley*, C. L., 70; 71, and cases there cited.

<sup>68</sup> *People v. Callen*, 101 Pa. St. 375.

<sup>69</sup> *Com'th v. Pattison*, 109 Pa. St. 165, 170.

<sup>70</sup> *Fry's Election*, 71 Pa. St. 302, 306.



the same word has different and various meanings, and the peculiar sense in which it is used in any sentence is to be determined by the context."<sup>71</sup> "It does not follow, either logically or grammatically, that, because a word is found in one connection in the constitution with a definite sense, therefore the same sense is to be adopted in every other connection in which it occurs."<sup>72</sup> Great caution is, therefore, to be observed in applying this principle as a rule of constitutional construction."<sup>73</sup>

§ 515. [A comparison of the whole instrument, however, as in the case of statutes, serves still another and more important purpose. Similarly to the rule applicable to parts of the latter,<sup>74</sup> though probably not quite to the same extent,<sup>75</sup> a construction which raises a conflict between parts of a constitution is inadmissible, when, by any reasonable interpretation, they may be made to harmonize;<sup>76</sup> and equally inadmissible is a construction which would nullify or disregard any portion, any provision, clause, or word in the instrument."<sup>77</sup> "One part may qualify another so as to restrict its operation, or apply it otherwise than the natural construction would require if it stood by itself; but one part is not to be allowed to defeat another, if by any reasonable construction the two can be made to stand together."<sup>78</sup> A striking application of this principle occurred in the construction of two provisions of the constitution of Pennsylvania, the first of which declares "that each house of the Legislature shall judge of the election and qualification of its members; the other, that the trial and determination of contested elections of members of the Legislatures, and other officers named, shall be by the courts of law under general laws, to be enacted by the Legislature.

<sup>71</sup> *Cherokee Nation v. Georgia*, 5 Pet. 1, 19. Still, in that case, the word "foreign" in connection with "state" and "nation" was held to have the same meaning, to the exclusion of Indian tribes. See § 533, n. 208.

<sup>72</sup> Story, Const., § 454.

<sup>73</sup> *Cooley, C. L.*, 75. For some illustrations of the use of words, in the federal constitution, in different senses, varying with the

connection in which they occur, see *Potter's Dwaris*, 678.

<sup>74</sup> See ante, §§ 35-41.

<sup>75</sup> See *Houseman v. Com'th*; *Cantwell v. Owens*, infra.

<sup>76</sup> *People v. Wright*, 6 Col. 92.

<sup>77</sup> *Cooley, C. L.*, 71.

<sup>78</sup> *Ibid.* In case of irreconcilable repugnancy, the provision last in order of time and local position is said to prevail: *Quick v. White-water Tp.*, 7 Ind. 570, cited *ibid.*, note 3.

It was held that the latter provision did not take from each branch of the Legislature the power given it by the former, but was intended only to provide for a method of procuring and presenting to the same the evidence and information necessary for an intelligent decision, and to secure early action." Whilst, however, it may, in general, be laid down that the intent of a particular provision of a constitution is to be gathered from the whole of it," it is intimated that an argument from the reading of other clauses as to the construction of a particular one, is of force only where the meaning of the latter is dubious, or, at least, that such an argument becomes far less persuasive where the meaning of the provision is not doubtful." In the latter case, indeed, it is said that the courts have no right to place a different meaning on the words employed, because their literal interpretation may happen to be inconsistent with other provisions of the instrument concerning other subjects."

§ 516. [The Bill of Rights and the Constitution are also to be construed together;" and it has been held, that, if the provisions in the body of the constitution differ from those of the bill of rights, the former must limit and qualify the latter to that extent."

<sup>79</sup> McNeill's Elect'n, 111 Pa. St. 235. See this case, also ante, § 181.

<sup>80</sup> District Tp. v. Dubuque, 7 Iowa, 262; People v. Potter, 47 N. Y. 375.

<sup>81</sup> Houseman v. Com'th, 100 Pa. St. 222, 231.

<sup>82</sup> Cantwell v. Owens, 14 Md. 215. And it has been held that the rule that an ascertained general intent will control a particular one must yield, where the latter is plainly expressed, in which case effect must be given to it, though apparently opposed to the general intent deduced from other parts: Warren v. Shuman, 5 Tex. 441, cited in Cooley, C. L., 71, note 8. "If in one section, a power is specifically conferred, or a duty specially enjoined, which in general terms, is prohibited by other sections, the power or duty specially conferred or enjoined constitutes an exception to the general rule; the direction to employ

the power or discharge the duty in the particular instance is as mandatory as the general prohibition:" San Francisco, etc., R. R. Co. v. State B'd of Equalization, (Cal.) 13 Am. & Eng. R. Cas. 248 (Syll.) See, also, Elton v. Geissert, 10 Phila. (Pa.) 330, 333; supra, note 64.

<sup>83</sup> Baltimore v. State, 15 Md. 376. And that provisions of the schedule are to be construed with reference to, and in harmony with, provisions of the body of the constitution, see ante, § 513, and note 64.

<sup>84</sup> Ibid. It would seem, however, in view of the importance attached by popular sentiment to the provisions of a bill of rights, (see as to effect of the want of it in the federal constitution, 2 Bancr., Hist. Const., pp. 272, 291), as the very foundation upon which the organic law is built up, that the reverse of the decision above cited

§ 517. **Superseded and Succeeding Constitutional Provisions.**—Statutory provisions, which have expired or been repealed—may, as has been seen,<sup>85</sup> be looked at as aiding the construction of other provisions and enactments in *pari materia*. Similarly, clauses that have been eliminated from a constitution by amendment, may be referred to in aid of the interpretation of others originally associated with them and remaining in force.<sup>86</sup> And with equal propriety, the differences between the provisions of a new constitution and those of a previous one, and the construction placed upon the latter when in force, may be regarded by the courts in ascertaining the purpose and real meaning of the new provisions.<sup>87</sup> Conversely, as will hereafter be seen, identity of language in an old and new constitution may determine the construction of the latter in accordance with the construction placed upon the former.<sup>88</sup>

[And as a statute may sometimes be best interpreted by reference to a subsequent one,<sup>89</sup> so a restriction in a later or amended constitution upon the exercise of a power assumed to exist under a former one, has been referred to as “a clear recognition of the power, outside of the restriction.”<sup>90</sup>

§ 518. **Expansion and Restriction by Reference to Subject Matter and Object.**—[Inseparable from the history of a constitution and the facts surrounding its creation, and therefore a potent element in the construction of its general terms, is the consideration of the objects and purposes to be accomplished, or the mischiefs designed to be remedied or guarded against.<sup>91</sup> In the interpretation of statutes, these reflections may enlarge or restrict the natural and literal significance of the words

would be the more obvious and acceptable conclusion.

<sup>85</sup> Ante, §§ 48, 49.

<sup>86</sup> *Fletcher v. Peck*, 6 Cranch, 139.

<sup>87</sup> See *Houseman v. Com'th*, 100 Pa. St. 222, 230; *Buckalew, Const. of Pa.*, pp. 45–46, cit. *People v. Blodgett*, 13 Mich. 147. See post, § 531.

<sup>88</sup> Post, § 530.

<sup>89</sup> Ante, § 47.

<sup>90</sup> *Cronise v. Cronise*, 54 Pa. St.

255, 261.

<sup>91</sup> See *Cooley, C. L.*, 79; *People v. Chautauqua Co.*, 43 N. Y. 10. See, as an instance, the doctrine stated and established by decisions collected, in *Cooley, C. L.* 26, and *Re Fitzpatrick*, (R. I.) 5 New Eng. Rep. 675, that the first ten Amendments of the U. S. Constitution are to be understood as limitations upon the powers of the federal government only, except where the statutes are expressly mentioned

used," and they are applicable with the same effect in the interpretation of constitutions." Thus, as an example of the extending influence of this rule, the phrase "counties and townships," in the provision of the Michigan constitution already referred to,<sup>94</sup> was held to include all the municipal divisions of the state, the word "townships" being understood in a generic sense;<sup>95</sup> and under the provision of the Pennsylvania constitution requiring "municipal and other corporations and individuals invested with the privilege of taking private property for public use," to make just compensation for property taken, injured, or destroyed, it was held that a borough was so liable in respect of property taken for a highway, although not directly invested with the right of taking private property for that purpose, but doing so by invoking the authority of the courts to complete the act of appropriation.<sup>96</sup> On the other hand, the language, especially of constitutions, is not to be measured by mathematical rules, but is, in the nature of things, subject to many implied exceptions and qualifications,<sup>97</sup> arising from the application of general phrases to a variety of subject matters, and from the impracticability of providing, in a general scheme, for every possible detail or contingency that may arise. In illustration of the restrictive effect of a due consideration of the subject matter, purpose and scope of a provision upon the construction of general words occurring in it, may be cited the interpretation of the prohibition placed by the constitution of Tennessee upon the Legislature as to the passage of statutes creating corporations, or increasing or diminishing their powers by special law, as inapplicable to municipal corporations, the scope and purpose of the provision having no possible bearing upon such, and the subject matter of the provision and the object of the restriction having reference to such legislation only as affecting individuals and private corporations.<sup>98</sup> So, a provision

<sup>92</sup> Ante, §§ 73 et seq., 113 et seq.

<sup>93</sup> *People v. Potter*, 47 N. Y. 375; and see *Moers v. Reading*, 21 Pa. St. 188, 200.

<sup>94</sup> See *Wayne Co. v. Detroit*, 17 Mich. 390, ante, § 508.

<sup>95</sup> *Ibid.*

<sup>96</sup> *Hendrick's App.*, 103 Pa. St. 358, 361.

<sup>97</sup> *Kennedy v. Gies*, 25 Mich. 83.

<sup>98</sup> *State v. Wilson*, 12 Lea (Tenn.) 246; *Ballentine v. Pulaski*, 15 Id. 633. And see, for a similar

in a constitution declaring void all charters or grants of special or exclusive privileges under which a bona fide organization and commencement of business should not have taken place at the time of its adoption, was held intended to extinguish a vast number of charters obtained for speculative purposes, under which no such organization or commencement of business had been effected, but which were being hawked about to the manifest shame of the commonwealth, but never designed to repeal an act of assembly conferring certain powers upon a municipality as to the construction of water works and the supplying of water to its citizens, for the mere reason that it had not been exercised in whole or in part.<sup>99</sup> Again, a provision forbidding the Legislature by any law to create, renew or extend the charter of more than one corporation, was held not to be violated by an act giving building associations, whose charters had expired, the right to sue upon outstanding mortgages; the purpose of the provision being "to prevent improper combinations from obtaining privileges detrimental to the public welfare . . . not to prevent the Legislature from giving to other corporations, which had fulfilled their general purposes, authority to collect and distribute their remaining assets."<sup>100</sup>

§ 519. [So, again, the term "inhabitant," "resident," "person," may have an enlarged or restricted meaning, according to the purpose evinced by the provision in which it occurs. Thus, in a clause requiring one, in order to be qualified to serve as a representative, to have been, for one year next preceding his election, an "inhabitant" of the district for which he is chosen, that phrase was held obviously to imply a requirement of citizenship, but not of citizenship for an entire year; so that an alien who had been an inhabitant for the required length of time, but naturalized within a year preceding his election, was qualified.<sup>101</sup> Under a provision requiring as a

construction of a similar provision, *Moers v. Reading*, 21 Pa. St. 188.

<sup>99</sup> *Lehigh Water Co.'s App.*, 102 Pa. St. 515, 528.

<sup>100</sup> *Cooper v. Oriental S. & L. Ass'n*, 100 Pa. St. 402, 407. Nor is an act enabling a railroad company incorporated under a special act to

change its name and extend its road an act renewing or extending a special act of incorporation: *Atty-Gen. v. Joy*, (Mich.) 16 Am. & Eng. R. Cas. 643, 651.

<sup>101</sup> *Op. of Justices*, 122 Mass. 594.

condition precedent of the right to vote a residence in the state for a certain length of time, and in the election district or precinct for a prescribed period, the word "residence," it would seem, should be understood in its strict and technical sense, as implying a permanency of abode; for the object of such a provision clearly is to "prevent frauds by 'colonizing,' or bringing voters into the precinct immediately on the eve of election."<sup>103</sup> And such has accordingly been its construction, with the effect of excluding students temporarily sojourning at an institution of learning, from the right to vote in the election district in which they may, at the time, be dwelling.<sup>103</sup> A similar technical construction, required in connection with the subject matter, was placed upon the word "property" in the interpretation of a constitutional provision requiring corporations invested with the right of taking private property, to make just compensation for the same, when it was held that the laying of a pipe-line under a public road in a rural district though a person's land was such a taking of private property as required compensation to the owner of the fee,—the land, upon the construction of the road, having been subjected only to a servitude as to the surface occupied by the road.<sup>104</sup> Under the Fourteenth Amendment of the federal constitution, forbidding states to deny the equal protection of their laws to any "person," corporations authorized to do business in the state are held to be included.<sup>105</sup> A sheriff was held not to be a "state officer," within the meaning of a constitutional provision conferring on the Supreme Court jurisdiction of appeals and writs of error, where a state officer was a party.<sup>106</sup>

<sup>103</sup> Fry's Elect'n, 71 Pa. St. 302, 306.

<sup>104</sup> Ibid.; Vanderpoel v. O'Hanlon, 53 Iowa, 246. But see contra, where the student is emancipated from his father's family and has, at the time, no other domicile: Putnam v. Johnson, 10 Mass. 488; the requirement of residence being sometimes held in mean simply an absence of present intention to change: Dale v. Irwin, 78 Ill. 170; Lincoln v. Hapgood, 11 Id. 850; Wilbraham v. Ludlow, 99 Id. 587. Comp. Cooley, C. L., 754-756.

<sup>105</sup> Sterling's App., 111 Pa. St. 35. As to such appropriation under a street in a city, see Ibid., p. 41; Bloomfield, etc., Co. v. Calkins, 62 N. Y. 386.

<sup>106</sup> Santa Clara Co. v. R. R. Co., 118 U. S. 394; Singer Manuf'g Co. v. Wright, 33 Fed. Rep. 121; but this provision does not forbid a proper classification of corporations for purposes of state taxation: Ibid.

<sup>107</sup> State v. Dillon, 90 Mo. 229; State v. Spencer, 91 Id. 206. Comp. ante, § 508.

§ 520. **Presumption against Unnecessary Change of Law.**—[As, in statutes, the presumption against an intention to change the existing law beyond the specific purpose of the enactment may create numerous apparent exceptions from the general language employed,<sup>107</sup> so, in the construction of a constitutional provision, a due regard for the existing, whether statutory or common, law may produce a similar result. A new constitution, indeed, which does not change the frame of government, is to be regarded, not as a repeal, but as an amendment of the prior one.<sup>108</sup> “It may be called a new constitution, in the sense in which we call a machine new after it has left the repair shop. Still the fact remains that the constitution is but the prior constitution amended ;”<sup>109</sup> for though the amendments be radical, they are but amendments where a large body of the prior constitution is retained, and the frame of the government, *i. e.*, its form or system, remains substantially the same.<sup>110</sup> In such case, no intention to abrogate previously existing laws in general can be presumed, in the absence of expression to that effect.<sup>111</sup> It is, therefore, a sound rule of constitutional interpretation, that a constitution is to be construed with reference to previous legislation;<sup>112</sup> and the bearing of this rule is two-fold. “We are not to presume that the framers of the constitution intended uselessly to repeat an ordinary and well-established rule of law,” says the Supreme Court of Pennsylvania in a recent case.<sup>113</sup> “On the other hand, had it been intended to limit their [corporations] power to contract . . . or to give a construction to their contracts theretofore unknown to the law, doubtless it would have been so written.” In other words, a reference to the existing law may show the meaning of a constitutional provision in one of two ways; either by pointing to something different from that which is already covered by an established rule, upon the principle that a constitutional provision would not be limited to a declara-

<sup>107</sup> Ante, §§ 113 et seq.

<sup>108</sup> *Allegheny Co. v. Gibson*, 90 Pa. St. 397, 405, 407.

<sup>109</sup> *Ibid.*, p. 406.

<sup>110</sup> *Ibid.*

<sup>111</sup> *Ibid.*

<sup>112</sup> *Baltimore v. State*, 15 Md.

376 ; and see *Daily v. Swope*, 47 Miss. 367 ; *Brown's App.*, 111 Pa. St. 72, 80.

<sup>113</sup> *Edmundson v. R. R. Co.*, 111 Pa. St. 316, 321, *per Gordon, J.* See this case, ante, § 518.

tion of a legal principle existing and recognized outside and independently of constitutional sanction ; or by indicating the limits of the intended operation of the provision, upon the principle, that, in the absence of expressions showing a design to depart from the previously established law, an intention so to do will not be unnecessarily presumed, where the provision under construction may, without such result, accomplish its manifest purpose and immediate object : and to the latter rule is to be added its corollary, that an alteration clearly made by the constitution in the previous law will not be extended by construction beyond its terms."<sup>114</sup> Applying the first of these principles, it was held that the provision requiring railroad and other corporations taking property under the right of eminent domain to make or secure in advance just compensation for property taken, injured or destroyed, did not include injuries resulting from carelessness or negligence on the part of their employees ; for for such injuries the law already held them liable. Applying the second to the same provision, it was held that a railroad company, to which one grants the right to enter upon his land to construct a road, is not liable to him for damages resulting as a consequence of the company's entering and constructing the road ; for the immediate object and purpose of the provision was to impose the duty of compensation upon corporations having the right of eminent domain, and beyond this change in the law, it was not to be presumed that any further alteration of it was intended, such as would have limited the right of such corporations to contract for the building of their works, or changed the legal effect of their contracts ; *i. e.*, the application of the provision was confined to such injuries as arose from the exercise of the right of eminent domain."<sup>115</sup> Thus, again, a constitutional provision giving to the auditor's of counties "the exclusive power to prescribe and fix the compensation for all services rendered for, and to adjust all claims against," the same, without appeal, was not construed as changing the well-settled rule of our law that a man is not to be a judge

<sup>114</sup> Costigin v. Bond, 65 Md. 122.

<sup>115</sup> Edmundson v. R. R. Co., *supra*.



in his own case,<sup>116</sup> but was held never intended to confer upon a board of auditors the exclusive power to fix the compensation for the services of its own members, and adjust and allow their own claims; so that a statute fixing their compensation was not a violation of the provision referred to.<sup>117</sup> So, a provision that one accused of a crime shall have the right to be confronted with the witnesses against him, does not change the rule of evidence permitting proof by record; so that, on a trial for bigamy, certified transcripts of marriage records remain receivable as evidence of the marriages and the dates thereof.<sup>118</sup> A requirement that all elections by the people shall be by ballot, was held to impose no restriction upon the legislative power to provide for the ascertainment of the will of persons desiring a territory proposed to be annexed to a contiguous municipal corporation, in some other way than by public election.<sup>119</sup> A provision that every railroad company shall have the right with its road to intersect, connect with, or cross, any other railroad, does not change the existing policy and law of the state as to the prevention of railroad crossings at grade, when that is reasonably practicable.<sup>120</sup> A provision securing to a married woman her property as if she were a feme sole was held not to change the common law effect of a conveyance to husband and wife.<sup>121</sup> Nor does a declaration in the bill of rights that, in all criminal prosecutions, the accused has the right to demand the "nature and cause" of the accusation, abrogate a statutory rule making it sufficient to charge a crime substantially in the language of the act prohibiting and punishing it,—*e. g.*, to charge the crime of murder by an allegation that defendant "did feloniously, willfully and of his malice aforethought, kill and murder the deceased,"—without specifying the mode and manner of its commission,—*e. g.*, the instrument or other agency by means of which the

<sup>116</sup> See *Cooley, C. L.*, 507-509.

<sup>117</sup> *Kennedy v. Gies*, 25 Mich.

83. <sup>118</sup> *State v. Matlock*, 70 Iowa,

229. <sup>119</sup> *Graham v. Greenville*, 67 Tex.

62.

<sup>120</sup> *North. Centr. Ry. Co.'s App.*, 103 Pa. St. 621.

<sup>121</sup> *Robinson v. Eagle*, 29 Ark 202. And so, it seems, in Oregon: *Myers v. Reed*, 17 Fed. Rep. 401. And see *Fisher v. Trovin*, 25 Mich. 347; *Jaco's v. Miller*, 50 Id. 119.

murder was perpetrated."<sup>122</sup> Again, it was held that taxable "property," within the meaning of a constitutional provision, included offices, posts of profit, occupations and trades because previous legislation had recognized such as proper subjects of taxation, and there was nothing in the constitution "indicating an intention to prohibit the imposition of taxes on any species of property previously subjected thereto."<sup>123</sup>

§ 521. **Presumption against Evasion.**—[A constitutional provision, as well as a statutory one, is to receive such a construction as will frustrate attempts to evade its legitimate operation.<sup>124</sup> A provision that no statute shall take effect until published, except in cases of emergency, to be declared in the preamble or body of the enactment itself, cannot be evaded by means of a subsequent act undertaking to put into operation, before publication, a statute containing no such emergency clause.<sup>125</sup> A constitutional prohibition of laws increasing or diminishing the salaries of public officers during their terms of office, forbids the alteration of the law so as to make the amount of the compensation rest in the discretion of a majority of the judges of a court;<sup>126</sup> and a provision

<sup>122</sup> Goersen v. Com'th, 99 Pa. St. 388.

<sup>123</sup> Brown's App., 111 Pa. St. 72, 80. As to the influence of the common law, although a rule analogous to that formerly declared with reference to statutes: ante, §§ 127, 128; has been sought to be applied to constitutional provisions "in derogation of the common law:" see Brown v. Fifield, 4 Mich. 322, the better opinion is that that rule is of even less legitimate force in its application to constitutional provisions than in the construction of statutes: see Cooley, C. L., 73, 74; so that, whilst a "constitution shall be understood and construed in the light and by the assistance of the common law, and with the fact in view that its rules are still left in force:" Ibid., 73, it is not "to control the constitution," nor is "the latter to be warped and perverted in its meaning in order that no inroads, or as few as possible, may be made in the system of common

law rules:" Ibid. But, in the absence of a specification, in the constitution, of the means of carrying a power into effect, such will not be presumed to be intended as would interfere with recognized common law rights and relations, e. g., the authority of parents over minor children: Com'th v. Downes, 24 Pick. (Mass.) 227.

<sup>124</sup> "Attempts in covert modes to defeat its plain provisions must be set aside with the same certainty as when the methods are open": per Green, J., in Scranton Sch. Distr. App., 113 Pa. St. 176, 190-1.

<sup>125</sup> Cain v. Goda, 84 Ind. 209. But see State v. Yard, 42 N. J. L. 357, and State v. Ryno, (N. J.) 9 Centr. Rep. 36, that a constitutional objection to an act may be cured by subsequent enactment in the form of an amendment or supplement. See *Addenda*.

<sup>126</sup> Apple v. Crawford Co., 105 Pa. St. 300.

inhibiting municipal corporations from loaning their credit, renders unlawful, as a mere attempt at evasion, the purchase by a municipal corporation of a judgment held by a third party against its creditor, the object of the transaction being to enable such third party to collect his claim against his debtor through the corporation's right to set it off against the latter's claim upon it.<sup>127</sup> A prohibition of special legislation relating to the affairs of counties, is violated by an act excluding perpetually from its operation counties containing more than a designated and less than another designated number of inhabitants.<sup>128</sup>

<sup>127</sup> *Earley's App.*, 103 Pa. St. 273.

<sup>128</sup> *Morrison v. Bachert*, 112 Pa. St. 322. Such exclusion deprives the act of the character of a legitimate act for classification: *Ibid.*; as to the general admissibility of which, under a restraint upon special legislation, see *New York v. Squire*, (N. Y.) 10 Centr. Rep. 437; *Roup's Case*, 81 Pa. St. (32 S.) 911; *State v. Hudson*, 44 Ohio St. 137; *Cooley, C. L.*, 153, note 4. The case of *New York v. Squire*, supra, goes a step further, and declares an act relating to telegraph, etc., companies, "in any incorporated city in this state, having a population of 500,000 or over," unobjectionable on the score of private or local legislation. "This act," it is said at p. 440, "is general, in its terms applying to all cities in the state of a certain class, and to every corporation carrying on a business requiring the use of electrical wires or conductors in such cities." Compare the decision of the Supreme Ct. of Pa., in *Weinman v. Pass. Ry. Co.*, 11 Centr. Rep. 54, where an act for the incorporation, etc., of street railway companies in cities of the second and third classes, was held unconstitutional as being special legislation. "It selects," says the court, at p. 58, "such companies as may be located in cities of the second and third class and makes special provisions for them, while all the [other] street railway companies remain under the operation of the general

law. This is just what the Constitution declares shall not be done. In *Morrison v. Bachert*, supra, the phrase "affairs" was held to be designedly a broad one, and not to be restricted in its meaning so as to exclude the case of a statute regulating the fees of a county officer. See *Eitel v. State*, 33 Ind. 201, where a prohibition of local legislation, "regulating county and township business," was held not to affect an act erecting a criminal court for a particular county. Compare, under the provision referred to; as to "affairs" of counties, etc., the decisions of the Supreme Court of Pennsylvania, declaring unconstitutional, as an attempted evasion, the acts of 18 Apr. 1878, and 12 June, 1879, providing for the holding of courts in certain cities of the commonwealth, the cities, in the former act, being classified geographically, in the latter according to the population of the counties in which they might be located: *Com'th v. Patton*, 88 Pa. St. 258; *Seowden's App.*, 96 Id. 422. As to evasions of constitutional provisions forbidding the introduction of bills in the Legislature beyond a certain time, by introducing, in due season, a sham bill, and after the expiration of the period allowed for presenting new bills, amending it so as to produce an entirely new enactment, see *Cooley, C. L.*, 167, note 3.

§ 522. **Presumption against Ousting Jurisdiction.**—[There cannot, of course, in the construction of a constitution, be any presumption against an intention to bind the government.<sup>120</sup> But, there is, even in the consideration of the effect of constitutional provisions, a presumption against the existence of a design to oust the established jurisdiction of the Supreme Court, original or appellate, and such an effect will not be given to language which does not expressly or by necessary implication require it. Thus a constitutional provision declaring that the Supreme Court of the state should have original jurisdiction in certain cases of injunction, of habeas corpus, of mandamus to courts of inferior jurisdiction, and of quo warranto as to all officers of the state, etc., but should not exercise any other original jurisdiction, retaining, however, its appellate jurisdiction by appeal, certiorari, or writ of error, was held not to oust the jurisdiction conferred upon it by former legislation to issue writs of certiorari to courts of Quarter Sessions of the various counties to remove pending indictments and all proceedings thereon into the Supreme Court, and to send a case so removed into that court, down to another county for trial, if necessary, before any of the judges of the Supreme Court, each judge of that court retaining the power to sit and try indictments in any county of the state.<sup>120</sup>

§ 523. **Presumption against Interference with Federal Constitution.**—[As the constitution of a state or nation is the creature of the will of its people, expressing the fundamental principles that are to underlie and control its own government and affairs, there cannot, on the one hand, arise many questions of extra-territorial operation,<sup>121</sup> nor, on the other hand, could

<sup>120</sup> "The constitution, being the act of the people, and the compact according to which they have agreed with each other that the government which they have established shall be administered, is a law to the government:" *Emerick v. Harris*, 1 Binn. (Pa.) 416, 419. "The constitution is the law paramount which binds all departments of the government: *Stewart v. Com'th*, (Pa.) 10 Centr. Rep. 82, 84. And see ante, § 518,

n. 91.

<sup>120</sup> *Com'th v. Balph*, 111 Pa. St. 365, Trunkey, J., filing a dissenting opinion, in which Gordon and Clark, JJ., concurred. For recognition of the right of the Supreme Court, after the above provision came into effect, to issue a certiorari to a justice of the peace, see *Bauer v. Angeny*, 100 Pa. St. 429. See ante, § 151.

<sup>121</sup> The provisions of the Pennsylvania Const. of 1874, disqualify-

there be, within the territorial limits of any particular state, any question of excess of power, were it not for the effect of the federal constitution as the supreme law of every state, to which, within the scope of its provisions and operation, not only the statutes, but equally the constitution, of the state must be subordinate.<sup>132</sup> It follows, that, just as statutes must be construed with reference to constitutional provisions in *pari materia*, so the provisions of state constitutions must be construed with reference to provisions, upon the same subject, of the federal constitution, national treaties, and congressional enactments, and must, if possible, be so interpreted as not to conflict with the same.<sup>133</sup> Thus, for example, a provision of a state constitution declaring mortgages to be an interest in land, for purposes of taxation, was construed to have a prospective operation only, in order not to conflict with the provision of United States constitution against the impairing of contracts.<sup>134</sup>

§ 524. **Presumption against Injustice, Absurdity, etc.**—[Even less than in the case of a statute, can courts be permitted, in the construction of a constitution, to vary or annul a plain provision on the ground that it works injustice, hardship or inconvenience.<sup>135</sup> Limited as is the judicial discretion in the treatment of legislative enactments,<sup>136</sup> it is still more restricted when dealing with the fundamental law of the state.<sup>137</sup> As a general rule, it may be asserted, that, in interpreting a restrictive or permissive provision of the constitution, whose language, understood in its ordinary and obvious sense, pre-

ing from holding any office of honor or profit any person who fight a duel, etc., is said by Mr. Buckalew, *Const. of Pa.*, p. 233, clearly to contemplate "an extra-territorial commission of the offence" of duelling, etc., as well as the offence committed within the state. Nor does the disqualification depend upon a conviction, nor can it be removed by executive pardon: *Ibid.*; and the word "office" includes membership in the Legislature: *Ibid.*

<sup>132</sup> See *Bish., Wr. L.*, §§ 11, 12, giving, in § 11, the order of precedence as follows: "I. The constitution of the United States;

II. Treaties; III. Acts of Congress; IV. The Constitutions of the several States; V. State Statutes; VI. By-laws of Municipal Corporations." See, also, *Flint River, etc., Co. v. Foster*, 5 Ga. 194, 204, there referred to.

<sup>133</sup> And the decisions of the federal courts are controlling as to the interpretation of the federal constitution, etc.: *Bish., Wr. L.* § 35b; *Cooley, C. L.*, 15.

<sup>134</sup> *Beckman v. Skaggs*, 59 Cal 541. See *supra*, note 12.

<sup>135</sup> See *Cooley, C. L.*, 87.

<sup>136</sup> *Ante*, §§ 263, 266.

<sup>137</sup> *Greencastle Tp. v. Black*, 5 Ind. 557

sents a definite and intelligible meaning, the courts have nothing to do with any argument drawn from the consequences likely to ensue the acceptance of such meaning, with a view to bending the constitution to the one side or to the other.<sup>138</sup> Nor, on the other hand, in determining whether a certain power falls within the limits of the constitutional grant, whether an act of the Legislature is constitutional or not, can the courts look beyond the instrument for the grounds of their decision, of which the general principles of justice, liberty, right or political wisdom, not contained or expressed in the constitution, can be no proper elements.<sup>139</sup> It is for this reason that it has become a maxim of the law that a statute cannot be declared unconstitutional unless it is plainly shown to offend against some specific provision, or necessarily implied<sup>140</sup> prohibition, and that to doubt is to sustain the act.<sup>141</sup> "We do not say, however, that, if a clause should be found in a constitution which should appear at first blush to demand a construction leading to monstrous and absurd consequences, it might not be the duty of the court to question and cross-question such clause closely, with a view to discover in it, if possible, some other meaning more consistent with the general purposes and aims of these instruments."<sup>142</sup> Indeed, it has been intimated that the received sense and literal meaning of words, where that sense and meaning involve absurdity, contradiction, injustice or extreme hardship, may, with great caution, be slightly bent to a sense in harmony with the intention of the framers;<sup>143</sup> and, as has been seen, the injunction of literal interpretation is usually coupled with the condition that it lead to no absurdity.<sup>144</sup> Whatever may be the true limits of this rule, it cannot be doubted that it has, in some cases, been acted upon, and the unreasonableness of an interpretation,

<sup>138</sup> Ibid.; *Oakley v. Aspinwall*, 3 N. Y. 547; *Weill v. Kenfield*, 54 Cal. 111; *Wayne Co. v. Detroit*, 17 Mich. 390; *Story, Const.*, § 426; *Cooley, C. L.*, 87.

<sup>139</sup> *Sharpless v. Philadelphia*, 21 Pa. St. 147; *Scowden's App.*, 96 Id. 422, 425.

<sup>140</sup> See *Cooley, C. L.*, 208; *Page v. Allen*, 58 Pa. St. 338, 345, 346.

<sup>141</sup> *Sharpless v. Philadelphia*, supra; *Cooley, C. L.*, 88, 192-222.

<sup>142</sup> Id. 87-88.

<sup>143</sup> *Taylor v. Taylor*, 10 Minn. 107, where, to avoid such results, a majority of those actually voting was held to be a majority of the electors required by the constitution.

<sup>144</sup> See ante, §§ 507, 509.

if not the sole ground, has at least been made one of the grounds of its rejection. Under a provision forbidding the enactment thereafter of any law creating, renewing or extending the charter or privileges of more than one corporation, it was said that a literal construction contended for, would have the effect of prohibiting the passage of any law, *e. g.*, permitting two railroads to connect their works, or two counties to make a contract between them, or giving new powers to a whole class of corporations; and the court added: "We must keep clear of these absurdities, if we can do so, without allowing the constitutional injunction to be disregarded."<sup>145</sup> A provision of a constitution declared that the debt of no municipality should ever exceed seven per cent. of the assessed value of the taxable property therein, nor should any municipality incur any new debt or increase its indebtedness to an amount exceeding two per cent. of such assessed value, without the assent of the electors thereof at a public election. It was held that the proper construction of the provision must be to forbid, except when sanctioned by such an election, the increase of indebtedness to an amount, which, added to the existing indebtedness, would exceed two per cent. "The argument that ignores the aggregate indebtedness and considers the addition only, proves too much. It would nullify the right of electors to vote on the question of increase altogether. By successive steps, each less than two per cent., the city might have the aggregate indebtedness reach seven per cent. without a vote of the electors. Up to that per centum the city would deny the right of the electors to vote on the question of increase, and beyond that per centum the Constitution itself prohibits any increase."<sup>146</sup> A provision securing to one accused of a crime the right of a public trial, does not, upon the same ground of absurdity, abridge the power of the trial court to expel a boisterous and insubordinate audience, and protect an

<sup>145</sup> *Moers v. Reading*, 21 Pa. St. 188, 201, *per* Black, C. J. The provision was held, in this case, not to apply to political corporations, which, being the only point

in the case, left the exact force of it undecided. See *ante*, § 518.

<sup>146</sup> *Wilkes-Barre's App.*, 109 Pa. St. 554, 559; and see *Millerstown v. Frederick*, 114 Id. 435.

intimidated and embarrassed witness."<sup>147</sup> A provision, requiring the awarding of contracts to the lowest bidder, on adequate security, was construed<sup>148</sup> as giving a discretion to the officers charged with the duty of acting under it, to determine who was the lowest bidder and what was adequate security, in a manner similar to the construction put upon analogous statutory requirements.<sup>149</sup> The provisions contained in many state constitutions confining the legislation embodied in any one statute to a single subject; to be expressed in its title,—provisions directed against the practice of log-rolling legislation and smuggling bills, are, upon similar principles, given an effect not calculated to embarrass the Legislature by making laws unnecessarily restrictive in their scope and operation, and thus multiplying their number.<sup>150</sup> "The general purpose of these provisions is accomplished where a law has but one general object, which is fairly indicated by its title."<sup>151</sup> It "would not only be unreasonable, but would actually render legislation impossible," to give them a strict literal interpretation which would "require every end and means necessary or convenient for the accomplishment of this general object, to be provided for by a separate act relating to that alone."<sup>152</sup>

§ 525. **Presumption against Retrospective Operation.**—[The genius of our law is opposed to retrospective legislation, and the same presumption that militates against a construction that would give such effect to a statute, requires, as a general rule, and in the absence of a clear expression or necessary implication of a design to the contrary, that constitutional provisions be regarded as intended to have a prospective operation.<sup>153</sup> Such a construction is, of course, imperative in

<sup>147</sup> *Grimmett v. State*, 22 Tex. App. 36.

<sup>148</sup> *People v. Fay*, 3 Lans. (N. Y.) 398.

<sup>149</sup> *Ante*, § 249.

<sup>150</sup> *Atty.-Gen. v. Weimer*, 59 Mich. 580.

<sup>151</sup> *Cooley, C. L.*, 173.

<sup>152</sup> *Ibid.* See as to this subject in detail, *Id.*, 170-183. As to the inapplicability of the constitutional requirements concerning repeals to implied repeals, see *ante*, § 191,

and of similar requirements concerning amendments to acts impliedly amending others by transferring duties, *Ibid.*, note; as to the interpretation of the word "necessary" in a constitution under similar considerations of convenience, etc., see *Baltimore v. State*, 15 Md. 376, 473. See, also, *supra*, notes 24, 26.

<sup>153</sup> *Cooley, C. L.* 76; *Bish., Wr. L.*, § 92a. *Comp. Buckner v. Street*, 1 Dill. 248, where the rule



a state constitution, where the contrary effect would antagonize some provision of the federal constitution.<sup>154</sup> On the other hand, as in statutes, so in constitutions, provisions affecting the remedy merely are held to be retroactive.<sup>155</sup> Nor is that an objectionable retroaction which simply draws some of the elements for its operation from the past.<sup>156</sup> So, a provision against increasing or diminishing the powers of corporations by special laws, applies as well to corporations in existence at the adoption of the constitution, as to those subsequently created.<sup>157</sup>

§ 526. **Strict Construction.**—[A constitution is “intended for the benefit of the people, and must receive a liberal construction.”<sup>158</sup> “The principle of strict construction would frustrate important provisions in every newly constructed frame of government.”<sup>159</sup> Such is the general rule, the keynote, as it were, of all interpretation of constitutional provisions, and is in harmony with the principles already discussed. No exception to it can be tolerated on the ground that the provision under discussion contravenes the common law.<sup>160</sup> But a distinction must be drawn, concerning the strictness and liberality of construction, between state constitutions and the federal constitution, the former only being entitled to a liberal, the latter subjected to a strict, construction in respect of the powers recognized in the government by the one, and delegated to it by the other.<sup>161</sup> And, where a provision,

against retroaction, so as to divest vested rights of property was held inapplicable, concerning slaves and slave-contracts, to the interpretation of the thirteenth Amendment of the U. S. constitution. And see dictum of Denio, J., in *Oliver Lee & Co's B'k*, 21 N. Y. 9, 12, as to the inapplicability of the principle to the construction of constitutional provisions in general. Comp. also, post, § 540.

<sup>154</sup> *Beckman v. Skaggs*, 59 Cal. 541, ante, § 523.

<sup>155</sup> See *Cusic v. Douglas*, 3 Kan. 123, post, § 526.

<sup>156</sup> See ante, § 280.

<sup>157</sup> *State v. Wilson*, 12 Lea (Tenn.) 246. And see to similar effect, *Pa. R. R. Co. v. Duncan*, 111 Pa. St. 352, as to the operation

upon corporations previously existing, of a provision, in a new constitution, subjecting corporations invested with the right of eminent domain, to liability for consequential damages resulting from its exercise. *Comp. Pa. R. R. Co. v. Lippincott*, 116 Pa. St. 472.

<sup>158</sup> *Morrison v. Bachert*, 112 Pa. St. 322, 329.

<sup>159</sup> *Com'th v. Clark*, 7 Watts & S. (Pa.) 127, 132. For instances of what may, in a sense, be termed strict construction, see supra, notes, 9, 24, 26, 33, 64, § 518 and notes, §§ 520 and 522 and notes.

<sup>160</sup> Ante, § 520, note.

<sup>161</sup> *Weister v. Hade*, 52 Pa. St. 474, and cases there reviewed: *Cooley*, Const. L., 10; post, § 535.

general in its language and objects, is followed by a proviso, the rule applicable to such cases occurring in statutes<sup>162</sup> has been applied to constitutions, viz.; that the proviso is to be strictly construed, as taking no case out of the provision that does not fairly fall within the terms of the proviso, the latter being understood as carving out of the provision only specified exception, within the words as well as within the reason of the former.<sup>163</sup> Thus, where a provision of a constitution declared that no person should be excluded as a witness in a civil suit, because of being a party to it, or interested in the issue to be tried, but added, by way of proviso, that, in actions by or against executors, administrators, or guardians, in which judgment might be rendered for or against them, neither "party" should be allowed to testify against the other, as to any transaction with, or statement of, the testator, intestate, or ward, unless called by the opposite party, it was held that one who had an interest in the issue of the suit, but was not a *party* to it, was not within the proviso, and hence competent to testify under the general clause.<sup>164</sup> So, a clause in a constitution saving and continuing, as if no change had taken place, all "suits, rights, actions, prosecutions, recognizances, contracts, judgments and claims," was held not to preclude a change of remedy in any of these matters.<sup>165</sup> And a similar strict construction was placed upon a constitutional provision conferring upon certain courts the power to relieve persons, under specified conditions and upon proceedings designated therein, from political disabilities declared against them by a previous section of the same article.<sup>166</sup>

§ 527. **Usage, Contemporaneous and Legislative Construction.**—[A like weight as is attributed by the courts to long usage and authoritative contemporaneous construction in the interpretation of statutes, attends the same in the interpretation of constitutional provisions.<sup>167</sup> A practical construction

<sup>162</sup> Ante, § 186.

<sup>163</sup> *McRae v. Holcomb*, 46 Ark. 306.

<sup>164</sup> *Ibid.* See *Potter v. Nat. B'k*, 102 U. S. 163, for a decision to the same effect on U. S. Rev. St., § 858, of precisely similar tenor as the provision referred to in the

preceding case.

<sup>165</sup> *Cusic v. Douglas*, 3 Kan. 123. Comp. ante, § 525.

<sup>166</sup> *State v. Woodson*, 41 Mo. 221.

<sup>167</sup> *Cooley, C. L.*, 81-85; *Bish. Wr. L.*, § 104; *Sedgw.*, 552, and cases cited in places referred to.

placed upon a constitutional provision by the judiciary acting under it, *e. g.*, the practice of the judges of the Supreme Court of the United States to sit as circuit judges,<sup>168</sup> running back to the very inception of the federal judicial system, was held to be a "contemporary interpretation of the most forcible nature," and conclusive of the legality of the practice.<sup>169</sup> Of similar weight and dignity is the construction placed by the political departments of the government upon constitutional provisions under which they are charged with acting.<sup>170</sup> And the greatest deference is shown by the courts to the interpretation put upon the constitution by the Legislature, in the enactment of laws and other practical application of constitutional provisions to the legislative business, when that interpretation has had the silent acquiescence of the people, including the legal profession and the judiciary, and especially when injurious results would follow the disturbing of it.<sup>171</sup> The deference due to such legislative exposition is said to be all the more signal when the latter is made almost contemporaneously with the establishment of the constitution, and may be supposed to result from the same views of policy and modes of reasoning that prevailed among the framers of the instrument thus expounded.<sup>172</sup> An early assumption and continued exercise by the Legislature of the power to grant divorces was thus held to establish the existence of the power under the constitution then in force ;<sup>173</sup> the frequent passage of laws of a certain description, as conclusive that they did not fall within the prohibition of a particular clause in the constitution ;<sup>174</sup> an unbroken practice of passing statutes entitled merely as "supplements" to certain other acts, and giving no further intimation of their contents, as settling the sufficiency of such description under a provision requiring the subject matter of an act to be

<sup>168</sup> *Stuart v. Laird*, 1 Cranch, 299.

<sup>169</sup> *Ibid.*

<sup>170</sup> *People v. La Salle*, 100 Ill. 495.

<sup>171</sup> *Moers v. Reading*, 21 Pa. St. 188, 201; *State Line, etc., R. R. Co.'s App.*, 77 Id. 429; *Bingham v. Miller*, 17 Ohio, 445; *Johnson v. R. R. Co.*, 23 Ill. 207; *Howell v. State*, 71 Ga. 224; *Baltimore v.*

*State*, 15 Md. 376; *Cooley, C. L.*, ubi supra.

<sup>172</sup> *People v. Wright*, 6 Col. 92, cit. *Sedgw.* 412; *People v. Green*, 2 Wend. (N. Y.) 266, 274.

<sup>173</sup> *Cronise v. Cronise*, 54 Pa. St. 255, 260 (see this case also, ante, § 517); *Bingham v. Miller*, supra.

<sup>174</sup> *Moers v. Reading*, supra; *Johnson v. R. R. Co.*, supra.

expressed in the title ;<sup>176</sup> the custom of the Legislature to prohibit, in one bill, the sale of liquors in various detached parts of the state, as determining such to be a compliance with the constitutional requirement of a single subject.<sup>177</sup> Indeed, as it is the duty of the court to uphold a statute as constitutional, if this can possibly be done,<sup>177</sup> this rule, where the meaning of a constitutional provision, upon the conflict or harmony between which and the statute under construction the validity of the latter depends, is not perfectly clear, may require the court to put a construction upon the constitution, in consonance with the legislation, which may not apparently be the most obvious and natural meaning of the language.<sup>178</sup> Thus, where the constitution of a state declared that the members of its General Assembly should receive such "salary" as should be fixed by law, and no other compensation whatever, and an act was passed entitling members of the General Assembly, in addition to a fixed compensation of \$1000 for each session not exceeding one hundred days, to a further compensation of \$10 per day for the time necessarily spent after the expiration of the hundred days, the court, in order to avoid a conflict between the constitution and the statute, construed the word "salary" in the former as synonymous with "wages."<sup>179</sup>

<sup>176</sup> State Line, etc., R. R. Co's. App., supra.

<sup>177</sup> Howell v. State, supra.

<sup>177</sup> Ante, §§ 178-180.

<sup>178</sup> Slack v. Jacob, 8 W. Va. 612.

<sup>179</sup> Com'th v. Butler, 99 Pa. St. 535. Where the constitution declared that "the trial and determination of contested elections of . . . all public officers . . . municipal or local, shall be by the courts of law," under general laws ; and an act of assembly provided that each branch of city councils "shall judge of the *qualifications* of its members, and contested *elections*" (See note 195, *infra*) shall be determined by the courts of law." it was held that the court, which, by general law had been given jurisdiction in cases of contested elections where the petition alleged, and specified the particulars

wherein it was claimed, that the election was "undue and illegal," had no jurisdiction, under that act, to declare vacant the seat of one who was duly and regularly elected a member of councils, but whose election was contested simply upon the ground that he was disqualified for holding the office: Auchenbach v. Seivert, 21 W. N. C. (Pa.) 849. (Comp. ante, § 420, n. 21 : that, however, a power given to councils to judge of the election of its members, not in terms made exclusive, is not final so as to oust the common law jurisdiction of courts by quo warranto, see *Ibid.* ; and so where the right is given to councils to judge of the "qualifications, elections and returns" of members: State v. Fitzgerald, 44 Mo. 425: but see Com'th v. Leech, 44 Pa. St. 332).

§ 528. [It is obvious from the instances cited of the application of this rule, and is probably universally true,<sup>180</sup> that, wherever usage or legislative practice has been allowed by the courts to dictate the interpretation of a constitutional provision, the meaning of the latter was, at least to some extent, subject to a reasonable doubt. Even the construction adopted and acted upon by the Legislature, whilst always entitled to weight and respectful consideration, is not binding upon the courts;<sup>181</sup> nor is the fact of a long recognition of a statute, unquestioned and acted upon by the courts, conclusive of its constitutionality.<sup>182</sup> "We think we allow to contemporary and practical construction its full legitimate force when we suffer it, where it is clear and uniform, to solve in its own favor the doubts which arise on reading the instrument to be construed;" but "acquiescence for no length of time can legalize a clear usurpation of power, where the people have plainly expressed their will in the constitution, and appointed judicial tribunals to enforce it."<sup>183</sup> "Neither the debates [in the constitutional convention], nor supposed views of the people, nor the dictum of this court," says Mr. Justice Trunkey in a recent case,<sup>184</sup> "nor all combined, can set aside the plain meaning of a constitutional provision; but if the sense of a clause be doubtful, the contemporaneous understanding is material."

§ 529. *Stare Decisis*.—[Where, however, an authoritative judicial decision, involving the very point at issue, has declared the interpretation of a constitutional provision, and that interpretation has become the basis of property and contract rights, the rule of *stare decisis*, applicable in similar cases to the interpretation of statutes, is recognized also in that of constitutions.<sup>185</sup> And even where the former decision is so clearly erroneous as to compel its rejection by a succeeding court, or upon subsequent consideration, in another case, it remains binding upon the interests involved

<sup>180</sup> See Cooley, C. L., 85.

<sup>181</sup> State Line, etc., R. R. Co's. App., 77 Pa. St. 429, 432.

<sup>182</sup> Baltimore v. State, 15 Md. 376. But see, as to mere formal

<sup>183</sup> See Cooley, C. L., 58-66.

and technical defects and objections, Cont. Impr. Co. v. Phelps, 47 Mich. 299.

<sup>184</sup> Cooley, C. L., 85.

<sup>185</sup> Pike Co. v. Rowland, 94 Pa. St. 238, 249.

and adjudicated in the controversy in which it was pronounced.<sup>186</sup> It is proper, in this connection, to note a case of somewhat peculiar features, which goes beyond this rule. A liquor law passed in 1855 by the Legislature of Indiana expressly repealed a former one of 1853. For a period of three years, the Supreme Court of the State was divided upon the constitutionality of that part of the act of 1855 which inhibited the retailing of liquors; but finally, under a new organization, declared the entire act of 1855 unconstitutional. "Under such circumstances," it was said, "it would be unjust—would be a violation of all principles of right—to hold that the act of 1853 was all this time in force, and the people incurring its penalties. It would make the law a concealed trap to catch victims;" and accordingly, it was held that the penalties appointed by the act of 1853 were not incurred by persons acting contrary to its provisions during the three years that the Supreme Court was divided on the question of the validity of the act of 1855.<sup>187</sup>

§ 530. **Effect of Adoption of Adjudicated Provisions of Former or Other Constitutions.**—[As a statute may carry with it the construction of its phraseology by adopting language that has acquired a definite and settled meaning,<sup>188</sup> so the incorporation into a new constitution of language and provisions contained in a former one of the same state, which have received, under it, a judicial construction, is regarded as an adoption of the latter; for such language or provisions must be presumed to

<sup>186</sup> Id. 59–60.

<sup>187</sup> *Ingersoll v. State*, 11 Ind. 464, 465. See the criticism of this decision in Sedgw., at p. 338, note 8, where it is said to be "directly opposed to all correct theory of judicial decision and of its effects,"—"a weak yielding to the apparent hardship of the case,"—"worthless as a precedent,"—"one of the rarest specimens of judicial absurdity," etc. It is suggested that this language is too strong. To doubt the constitutionality of an act is to affirm it: ante, § 524. The division of the court and the consequent failure to declare the act of 1855 unconstitutional were, in their effect, to

all intents and purposes, except for the purpose of being binding in future decisions, an affirmation of its validity. The act of 1853 was, therefore, repealed, until the final decision adverse to the act of 1855 re-instated that of 1853. Upon the principle above stated (see § 1, note), applicable to statutes—and there seems to be no reason why a different rule should prevail as to constitutions—acts done before such re-instatement should remain unaffected by it. It is admitted, however, that the weight of decision is the other way. See *Cooley*, C. L., 224, but comp. cases cited there in note 2.

<sup>188</sup> Ante, §§ 367, et seq.

have been retained with knowledge of the construction placed upon them, and the courts will feel bound to adhere to it.<sup>189</sup> Thus, where a constitution, repeating a provision of a former one, authorized the Legislature to establish "inferior courts," it was held, following the interpretation of that phrase under the earlier constitution,<sup>190</sup> that it was intended to mean courts whose judgment and decrees were reviewable by an appellate tribunal, whether the latter be a circuit or supreme court, and not necessarily courts whose jurisdiction was inferior or limited within the common law sense of the term.<sup>191</sup> So, where a provision in a new constitution, copied from that of the old one, gave the Legislature the right to tax "merchants, peddlers and *privileges*," the latter word was interpreted, according to the meaning it had previously acquired, as signifying the exercise of an occupation or business requiring license.<sup>192</sup> And similarly,—and again analogously with the case of statutes,—it has been held, that, when, in the constitution of one state, provisions contained in the constitutions of other states, where they have received a settled judicial or legislative interpretation, are adopted in language identical or synonymous, that interpretation is deemed to be adopted with them.<sup>193</sup> But the adoption of such an interpretation does not, of necessity, adopt its appli-

<sup>189</sup> Exp. Roundtree, 51 Ala. 42.

<sup>190</sup> See Nugent v. State, 18 Ala. 521.

<sup>191</sup> Exp. Roundtree, *supra*.

<sup>192</sup> Jenkins v. Ewin, 8 Heisk. (Tenn.) 456; Wiltse v. State, Id. 544.

<sup>193</sup> Daily v. Swope, 47 Miss. 367; Walker v. Cincinnati, 21 Ohio St. 14; Leavenworth Co. v. Miller, 7 Kan. 479; Hess v. Pegg, 7 Nev. 23; Bish., Wr. L., § 47; Cooley, C. L., 64, where this rule seems to be put upon a principle at least akin to that of stare decisis. In Daily v. Swope, *supra*, it is put upon the ground that the framers of the constitution must be presumed to have been conversant with, and to have intended to adopt the construction put upon the provisions transcribed in the state, from whose constitution they were borrowed. Neither of these

grounds seems satisfactorily to explain, or justify the existence of, the rule under discussion. The principle of stare decisis applies with force only to the decisions of the same court or jurisdiction Cooley, C. L., *ubi supra*; and it is not as important to find out what the framers of a constitution had in their minds, as to ascertain what the people intended when they adopted it. It would certainly be a violent presumption to attribute to them a knowledge of, and an intention to adopt, the construction put upon particular provisions of the constitution in the jurisdictions from which they have been borrowed. No doubt, such decisions are entitled to respect. But there seems to be no recognized principle, in law or in common sense, upon which they can reasonably be given a higher force.

cation. Thus, where the courts of Indiana had determined, that, under a certain provision of the constitution of that state, special or local laws could not be enacted by the Legislature where a general law could be made to accomplish the purpose,—whilst that interpretation was adopted by the courts of Nevada upon an incorporation of the same provision in the constitution of the latter state, its application by the Indiana courts to the subject of the removal of a county seat, was not accepted by those of Nevada.<sup>194</sup>

§ 531. *Change of Language.*—[Slight changes in the phraseology of a later, as compared with that of an earlier, provision would seem, on account of the necessary generality of language, to be of even less significance in a constitution than in a statute.<sup>195</sup> Thus, in Pennsylvania, the constitution of 1776 provided that “the members of the General Assembly shall receive such *wages* and mileage for regular and special sessions, as shall be fixed by law;” the constitution of 1790 changed the word “wages” to “compensation.”<sup>196</sup> “the senators and representatives shall receive a compensation for their services to be ascertained by law;” the constitution of 1838 left this clause unaltered; but that of 1874 provided that “the members of the General Assembly shall receive such *salary* and mileage for regular and special sessions as shall be fixed by law,” and added: “and no other compensation whatever.” It was held that the phraseology, throughout, was substantially synonymous; that the change therein was

<sup>194</sup> Hess v. Pegg, *supra*.

<sup>195</sup> See ante, §§ 378, et seq. Where the earlier constitution had made each branch of the Legislature the judge of the “qualifications” of its members, and the later authorized it to judge of “the election and qualifications” of the members, it was said: “While the addition of the word ‘election’ may not give to the house any power which it might not have exercised under authority to judge of the ‘qualifications’ of its members, it clearly shows an intention not to restrict the legislative power.” *Re Cont. Election of McNeill*, 111 Pa. St. 235, 241. But see note 179. From the adoption

in the Pa. Const. of 1874, of the provision of the earlier constitution imposing disqualifications upon persons concerned in duelling, with the omission, however, of the clause contained in the earlier: “but the Executive may remit the said offence and all its disqualifications,” it is inferred that the disqualification pronounced by the constitution of 1874 is not subject to removal by executive pardon: *Buckalew, Const. of Pa.* 233.

<sup>196</sup> “Doubtless, because they thought it a word more befitting the dignity and importance of the office:” *Com’t’h v. Butler*, 99 Pa. St. 535, 541.



not intended to make any change in the rule; and that consequently an act fixing the salary of members of the Legislature at \$1000 for a session of a hundred days, and allowing an additional compensation of \$10 per day for the time necessarily spent in service after the expiration of the hundred days, was not, as to the latter provision, a violation of the constitution.<sup>197</sup> Similarly, the difference between the phraseology of a saving clause in an amended constitution, providing that all laws not inconsistent therewith, all rights, actions, etc., should "continue as if the said alterations and amendments had not been made," and that of a subsequent new constitution, "as if this constitution had not been adopted," was treated as insignificant in the determination of the question whether or not the latter was, similarly to the former, to be regarded as, in fact, a mere amendment of the constitution previously in force.<sup>198</sup>

§ 532. **Associated Words and Clauses.**—[Principles of common sense, applicable to the construction of statutes, are, of course, equally applicable to that of constitutions. Such is the rule embodied in the phrase *noscuntur a sociis*.<sup>199</sup> Thus, in a provision that "county officers shall consist of sheriffs, prothonotaries, registers of wills, recorders of deeds, commissioners, treasurers, surveyors, auditors or controllers, clerks of the courts, district attorneys," etc., it was said that "the fair import of the language 'auditors or controllers,' admits of one construction only. It assumes that each substantially exercises the same powers and performs the same duties."<sup>200</sup> Again, the fact that the words giving the governor the power of filling vacancies in offices were coupled with words indicating the necessity of the senate's acting thereon, would show that only vacancies in such offices as require the senate's confirmation were intended.<sup>201</sup> A provision requiring muni-

<sup>197</sup> Ibid. See, also, Id., p. 543, as to "salary" and "fixed salary," occurring in the same constitution.

<sup>198</sup> Allegheny Co. v. Gibson, 90 Pa. St. 397, 406. Comp. ante, § 520.

<sup>199</sup> Ante, § 400.

<sup>200</sup> Taggart v. Com'th, 102 Pa. St. 354, 364. Consequently, when

those powers and duties are co-extensive with the county, by whatever name the officer performing them may be designated, he is a county officer,—*e. g.*, a "city controller," in a city co-extensive with a county of the same name: Ibid.

<sup>201</sup> Com'th v. Callen, 101 Pa. St. 375.

icipalities, when incurring indebtedness, to provide for the collection of an annual tax "sufficient to pay the *interest* and also the principal thereof in thirty years," clearly applies only to an indebtedness which is contracted by the municipality itself, and, for some definite period, is interest-bearing, and not to incidental and ordinary expenses, *e. g.*, for the making and repairing of township roads.<sup>202</sup> And so, where the limitations contained in the first clause of a section clearly related only to the conferring of rights upon individuals, other similar limitations contained in the second clause were held to be manifestly directed to the same object, and not to apply to municipal corporations.<sup>203</sup> Nor would a provision forbidding the creation, renewal or extension of charters, in a section relating to corporations "with banking or discounting privileges," extend to such as had no such powers, *e. g.*, to municipal corporations,<sup>204</sup> or building associations.<sup>205</sup>

[It may be here observed, also, that, in a provision that "all courts of record and all existing courts, *which are not specified in this constitution*, shall continue," etc., the relative clause was held applicable to both the antecedent terms, not only the one immediately preceding it.<sup>206</sup>

§ 533. **Expressio Unius, etc.**—[The maxim *Expressio unius est exclusio alterius*, in the sense in which, as has been seen,<sup>207</sup> it is properly applicable to the construction of statutes, is equally so in the interpretation of constitutional provisions. Thus, where such a provision gave the right to tax "merchants, peddlers and privileges," it was said to be clear that neither of the first two words included that which the third made subject to taxation.<sup>208</sup> It was said, however, by a late

<sup>202</sup> Lehigh Coal Co.'s App., 112 Pa. St. 360, 369.

<sup>203</sup> State v. Wilson, 12 Lea (Tenn.) 246; Ballentine v. Pulaski, 15 Id. 633.

<sup>204</sup> See Moers v. Reading, 21 Pa. St. 188.

<sup>205</sup> Schober v. S. F. & L. Ass'n, 35 Pa. St. 223; Cooper v. S. & L. Ass'n, 100 Id. 402. The word

"discount" was held to be construable in no strained sense, so, *e. g.*, as to include the selling of property with a remission of part

of the price for present payment, or the usual lending of money by building associations, but in the sense in which it is commonly understood, its banking sense, confined to dealing in promissory notes, bills of exchange, or other negotiable paper: Schober v. S. F. & L. Ass'n, *supra*, at pp. 229, 230.

<sup>206</sup> Com'th v. Hartranft, 77 Pa. St. 154, 155. See *ante*, § 414.

<sup>207</sup> *Ante*, §§ 397, et seq.

<sup>208</sup> Jenkins v. Ewin, 8 Heisk.

chief justice of Pennsylvania: "The expression of one thing in the constitution, is necessarily the exclusion of things not expressed. This I regard as especially true of constitutional provisions, declaratory in their nature. The remark of Lord Bacon, 'that, as exceptions strengthen the force of a general law, so enumeration weakens, as to things not enumerated,' expresses a principle of common law applicable to the constitution."<sup>209</sup> No doubt, "when the constitution defines the circumstances under which a right may be exercised or a penalty imposed, the specification is an implied prohibition against legislative interference to add to the condition, or to extend the penalty to other cases."<sup>210</sup> But this proceeds upon the principle, that, where a right is given and the conditions of its exercise are prescribed by a superior power, an inferior one charged with acting under and in accordance with it cannot vary or add to those conditions,—a principle obviously alike applicable whether the superior power be the people themselves and the governing rule the constitution, or whether the superior power be the Legislature and the governing rule a statute.<sup>211</sup> Except in the sense above indicated,<sup>212</sup> the maxim referred to can certainly not be deemed to be a principle of universal application in the construction of constitutions, any more than of statutes.<sup>213</sup>

(Tenn.) 456. So, in the case of the Cherokee Nation v. Georgia, 5 Pet. 1, the definition of the word "foreign," as excluding Indian nations was arrived at (p. 19), at least in part, by reference to the provision conferring on Congress power to regulate commerce "with foreign nations, and among the several states, and with the Indian tribes," in which the particular mention of the latter was held clearly to exclude them from the more general phrase "foreign nations," under which it was claimed they were, and admitted they might be, comprehended. See § 514, n. 71.

<sup>209</sup> Page v. Allen, 58 Pa. St. 338; 346, *per* Thompson, C. J. See, also, State v. Taylor, 15 Ohio St. 137, ante, § 513.

<sup>210</sup> Cooley, C. L., 78, citing; among other cases, Thomas v. Owens, 4 Md. 189, where it was

held incompetent for the Legislature to add to or change the constitutionally established qualifications of an officer. Substantially the same principle, and nothing more, was recognized by the decision in Page v. Allen, *supra*, the point involved in which scarcely justifies the broad generality of the language quoted. The question was simply whether the Legislature could add to the constitutional requirements to qualify a person to vote. Compare, however, *Re* Thirty-fourth Str. R. R. Co., 102 N. Y. 343, as to the right of the Legislature to prescribe conditions for the construction of street railroads, additional to those prescribed by the constitution.

<sup>211</sup> See ante, § 351.

<sup>212</sup> See Jenkins v. Ewin, *supra*.

<sup>213</sup> People v. Wright, 6 Col. 92, 94.

Whilst its application in the other sense may, to a limited extent, comport with the general theory of the federal constitution, as a delegation of express powers in which all that is not granted is to be deemed withheld, it is utterly at variance with the theory of state constitutions, which are limitations upon the powers of government, and under which whatever power is not denied is deemed to exist."<sup>214</sup> To give but a single illustration where instances might be multiplied indefinitely: where a constitution authorized and directed the Legislature to provide by law for "the establishment of schools throughout the state, in such manner that the poor may be taught gratis," it was held that the provision did not (as, upon the principle *expressio unius*, etc., in its misconceived sense, it undoubtedly would) imply a limitation upon the power of the Legislature to establish a common school system, free to the rich as well as the poor."<sup>215</sup>

§ 534. **Computation of Time.**—[The rules for the computation of time under constitutional provisions do not differ, in the various states, from those there recognized as applicable to the same purpose under statutes. Thus, under provisions requiring the governor to return bills presented to him for approval within a certain number of days, it is in general held that the first is to be excluded, and the last to be included in the computation.<sup>216</sup> A "day" in common acceptation, and ordinarily in a constitution, means a civil day of twenty-four

<sup>214</sup> See *Sharpless v. Philadelphia*, 21 Pa. St. 147, and post, § 535.

<sup>215</sup> *Com'th v. Hartman*, 17 Pa. St. 118.

<sup>216</sup> *Price v. Whitman*, 8 Cal. 412; *Iron Man. Co. v. Haight*, 39 Id. 540; *People v. Hatch*, 33 Ill. 9; *Corwin v. Comptr.-Gen.*, 6 Rich. (S. C.) 390. The constitutions of Illinois and South Carolina except Sundays from the computation. See, under a limitation to five days, Sundays excepted, *Op. of Just.*, 45 N. H. 607, where it was held that a bill sent to the governor on Wednesday, Aug. 17, and returned with his veto on Wednesday, Aug. 24, was a valid law, although the bill did not actually come into the governor's hands

until Aug. 18, and on Monday, Aug. 22, neither house was in session. (It is intimated in that case, also, that, where at the time of the adoption of a constitution a certain method of computing time is recognized, it applies to computations under constitutional provisions; but whether a statutory change in the rule would also apply to the constitution is doubted: p. 607.) A three days' limitation upon the right of either branch of the Legislature to adjourn seems to be exclusive of Sundays: *Buckelew, Const. of Pa.*, p. 52. And see *Id.*, pp. 195-196, as to computation of time generally under the Pa. Constitution.

hours, beginning and ending at midnight ;"<sup>217</sup> or in a provision requiring bills to be presented to the governor "one day previous" to adjournment, a space of at least twenty-four hours."<sup>218</sup>

§ 535. *Implications and Intendments.*—[The subject of implications and intendments in constitutional provisions belongs so peculiarly to a work devoted to the construction of constitutions, that anything like an attempt at exhaustive examination of it would be out of place here. All that is relevant in this connection is the statement of the general rule, that whatever is indispensable to render effective any provision of a constitution, whether the same be a prohibition or restriction, or the grant of a power, must be deemed implied and intended in the provision itself ;"<sup>219</sup> that, wherever a general power is given or duty enjoined, every particular power necessary for the exercise of the one and the performance of the other is given by implication :"<sup>220</sup> and that this rule, in its turn, is subject to the other, that, where the means for the exercise of a power granted are also given, no other or different means or powers can be implied on the ground of convenience or efficiency,"<sup>221</sup> and to the further qualification, elsewhere referred to,"<sup>222</sup> that, in the absence of specification of such means, none interfering with established relations or existing rights and obligations will be presumed to be intended, unless strictly necessary to give effect to the provision."<sup>223</sup> There is, indeed, a difference, in respect of implied powers, between the federal and state constitutions. "The constitution of the United States consists chiefly in a grant of enumerated powers ; hence, in interpreting it, the courts presume the existence of no power not expressly or impliedly conferred. On the other hand, a state constitution proceeds on the idea

<sup>217</sup> Op. of Just., *supra*, at p. 610.

<sup>218</sup> *Hyde v. White*, 24 Tex. 137.

<sup>219</sup> *Story*, Const., § 430; *Cooley*, L., 77.

<sup>220</sup> *Field v. People*, 3 Ill. 79. Thus the duty imposed upon the judiciary to support the constitu-

tion gives it the right to declare a statute unconstitutional and void: *Emerick v. Harris*, 1 Binn. (Pa.) 416, 420; *Cooley*, C. L., 192, etc.

<sup>221</sup> *Field v. People*, *supra*.

<sup>222</sup> *Ante*, § 520.

<sup>223</sup> *Com'th v. Downes*, 24 Pick. (Mass.) 227.

that all legislative functions are in the Legislature ;”<sup>224</sup> and “hence the General Assembly may exercise all the powers which are properly legislative, and which are not taken away by our own or by the federal constitution.”<sup>225</sup> “Congress can pass no laws but those which the constitution authorizes, either expressly or by clear implication, while the Assembly has jurisdiction of all subjects on which its legislation is not prohibited. The powers not granted to the Union are withheld, but the state retains every attribute of sovereignty which is not taken away.”<sup>226</sup>

§ 536. **Imperative and Directory Provisions.**—[It has been laid down in a recent case that constitutional provisions are absolutely mandatory, and in no case to be regarded as directory only, to be obeyed or not, within the discretion of either or all the departments of the government.<sup>227</sup> However well founded in reason this rule may be,<sup>228</sup> and however salutary in practice its general adoption might prove, it is certainly not to its full extent, borne out by authority. Probably as great liberties have been taken in this respect, with constitutional as with statutory provisions, the arguments decisive as to the former being in the main, drawn from considerations of convenience and supposed reasonableness, tested by the imagined consequences of a contrary interpretation, and leading the courts to the conclusion, whether properly or improperly, and with much divergence as to the results arrived at concerning particular provisions, that the direction in question was or was not intended to be complied with strictly and at all events.<sup>229</sup> As in the case of a statute,<sup>230</sup> where a constitutional provision clearly leaves something to the discretion of the Legislature,—as where it requires that a bill, before becoming a law, shall be fully and distinctly read

<sup>224</sup> Bish., Wr. L., § 92.

<sup>225</sup> *Sharpless v. Philadelphia*, 21 Pa. St. 147, 161.

<sup>226</sup> *Com'th v. Hartman*, 17 Pa. St. 118, 119; *Weister v. Hade*, 52 Id. 474; *Cooley, C. L.*, 10, 11.

<sup>227</sup> *Hunt v. State*, 22 Tex. App., 396. And see *Varney v. Justice*, (Ky.) 6 S. West. Rep. 457, where it is said that prohibitory language in a constitution is a positive nega-

tion, and the grant of a power is a mandate, the rule as to the construction of statutes not applying; so that a constitutional provision for holding elections between 6 A.M. and 7 P.M. renders notes received after 7 P.M. illegal. *Comp. ante*, § 438.

<sup>228</sup> See *Cooley, C. L.* 93, 94.

<sup>229</sup> *Comp. Cooley, C. L.*, 88-98.

<sup>230</sup> *Ante*, § 314.

on three different days,—it manifestly addresses itself to the judgment of that body,—*e. g.*, as to what reading shall be sufficiently full and distinct,<sup>231</sup>—and in that sense, must obviously be deemed directory.<sup>232</sup> Similarly, where it directs the awarding of contracts to the lowest bidder and upon adequate security.<sup>233</sup> But the courts have gone much farther. A detailed examination of what provisions have been held directory and what mandatory, and of the reasoning by which such decisions have been fortified, is not permissible here. A few instances of both classes, however, may serve to point out the effect of the rule applied to constitutions as compared with statutes. It is said, that, as a constitution is to be interpreted so as to carry out the great principles of government, not to defeat them, its commands as to the time or manner of performing an act are to be regarded as merely directory, wherever it is not said that the act shall be done at the time or in the manner prescribed, and no other.<sup>234</sup> Consequently, the time prescribed by a provision in the schedule of a constitution for the Legislature to provide by law for the holding of an election was held directory.<sup>235</sup> The same effect has been given to provisions prescribing the style of statutes,—“Be it enacted,” etc.;<sup>236</sup> requiring an oath from legislators to support the constitution;<sup>237</sup> obliging judges to give written opinions on every question arising on the record.<sup>238</sup> Mandatory, on the other hand, have been held provisions requiring the signing of bills and joint resolutions by the presiding officers of the respective houses of the Legislature, and by the secretary of the senate and the clerk of the house;<sup>239</sup> and the insertion of an emergency clause,

<sup>231</sup> Cooley, C. L., 96.

<sup>232</sup> See *Miller v. State*, 3 Ohio St. 475.

<sup>233</sup> *People v. Fay*, 3 Lans. (N. Y.) 398 (ante, § 524); or forbids special legislation “where a general law can be made applicable”: *Buckalew, Const. of Pa.*, p. 82, and cases there cited.

<sup>234</sup> *Com'th v. Clark*, 7 Watts & S. (Pa.) 127, 133.

<sup>235</sup> *Ibid.* But see *State v. Johnson*, 26 Ark. 281, as to a provision requiring officers to qualify within fifteen days after notice of appoint-

ment.

<sup>236</sup> *Swann v. Buck*, 40 Miss. 268; *McPherson v. Leonard*, 29 Md. 377; *Cape Girardeau v. Riley*, 52 Mo. 424. But see contra, *State v. Rogers*, 10 Nev. 250; *State v. Patterson*, (N. C.) 4 S. East. Rep. 350.

<sup>237</sup> *Hill v. Boyland*, 40 Miss. 618; so as to sustain legislation.

<sup>238</sup> *Willets v. Ridgway*, 9 Ind. 367.

<sup>239</sup> *State v. Glenn*, 18 Nev. 34; and see Cooley, C. L., 134, and cases there cited.

in case the statute was intended to take effect before publication;<sup>240</sup> requirements of proportional taxation;<sup>241</sup> a prohibition against the division of counties of a certain size without a popular vote;<sup>242</sup> a provision giving the right of cumulative voting at corporate elections.<sup>243</sup> Again, among the more important provisions contained in many constitutions which have been construed by some courts as mandatory, and by others as directory, are provisions requiring the reading of bills three times, on three different days, etc.,<sup>244</sup> and confining each statute to a single subject, to be expressed in its title.<sup>245</sup>]

§ 537. **Waiver of Constitutional Provisions. Estoppel.**—[“Where a constitutional provision is designed for the protection solely of the property rights of the citizen, it is competent for him to waive the protection, and to consent to such action as would be invalid if taken against his will.”<sup>246</sup> Thus, a provision forbidding the taking of private property without compensation may be waived.<sup>247</sup> And where one voluntarily avails himself of the benefit of a statute,—*e. g.*, where he chooses to pursue a remedy provided by statute, in preference to a common law remedy that was open to him,<sup>248</sup> or receives a benefit or compensation appointed by a statute,<sup>249</sup> he is taken to have waived the objection he otherwise might have made to its constitutionality.<sup>250</sup> Nor, in general, can this question be

<sup>240</sup> *Mark v. State*, 15 Ind. 98, and see ante, § 521.

<sup>241</sup> *Oliver v. Wash'n Mills*, 11 Allen (Mass.) 268; and see *Life Ass'n v. Assessors*, 49 Mo. 512.

<sup>242</sup> *State v. Merriman*, 6 Wis. 14.

<sup>243</sup> *Pierce v. Com'th*, 104 Pa. St. 150.

<sup>244</sup> *Directory: Miller v. State*, 3 Ohio St. 475; *Pim v. Nicholson*, 6 Id. 176. *Mandatory: Superv's v. Heenan*, 2 Minn. 330; *Stechert v. East/Saginaw*, 22 Mich. 104; *Weill v. Kenfield*, 54 Cal. 111; *People v. Starne*, 35 Ill. 121; *McCulloch v. State*, 11 Ind. 434; *Cannon v. Mathes*, 8 Heisk. (Tenn.) 504.

<sup>245</sup> *Pim v. Nicholson*, supra; *State v. Covington*, 29 Ohio St. 102; *Washington v. Page*, 4 Cal. 388; *Re Boston, etc., Mining Co.*, 51 Id. 624—hold such provisions

to be directory. The contrary view is said to be held in all other states: *Cooley, C. L.*, 180.

<sup>246</sup> *Cooley, C. L.*, 216.

<sup>247</sup> *Re Albany Str.*, 11 Wend. (N. Y.) 149; *Brown v. Worcester*, 13 Gray (Mass.) 31; and see *Edmundson v. R. R. Co.*, 111 Pa. St. 316.

<sup>248</sup> *Ralston v. Oursler*, 12 Ohio St. 105.

<sup>249</sup> See *Re Woolsey*, 95 N. Y. 135; *Philadelphia v. Com'th*, 52 Pa. St. 451, 455.

<sup>250</sup> So one who has taken stock in a corporation, though not one of the corporators, but with knowledge of a defect that would render the incorporation unconstitutional, waives the right to take advantage thereof: *McClinch v. Sturgis*, 72 Me. 288.



raised by any one not having an interest in the matter, or not being, in point of fact, affected by the act.<sup>251</sup> Thus, the question of the constitutionality of an act relating to the opening of a street, cannot be raised by one not assessed for the improvement under the act.<sup>252</sup>

§ 538. **Enactments and Contracts in Violation of Constitutional Provisions.**—[A statute,<sup>253</sup> or municipal ordinance<sup>254</sup> violating any provision, or passed in disregard of any mandate or prohibition, of the constitution, has no legal force.<sup>255</sup> But an enactment may be unconstitutional in part only, and valid as to the rest; the question depending upon the nature of the defect,—whether it is one that pervades the whole and attaches to every portion of it, or one that affects only some clause or provision capable of being detached from the rest without destroying the completeness of the legislation or causing a departure from the main intent of its enactment.<sup>256</sup> A contract violating, or tending to promote the violation of, a constitutional provision, is equally illegal and void with a contract having a similar effect as to a statute.<sup>257</sup> Thus, a contract forbidden to a municipality by the constitution was, in a case already referred to,<sup>258</sup> held to confer no rights upon it; and the Fourteenth Amendment of the federal constitution having declared all debts or obligations incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave, illegal and void, a contract made since the war for the sale and delivery of bonds of confederate states, was held to be void, and not a basis of an action for the recovery of damages for the breach thereof.<sup>259</sup>

§ 539. **Commencement. Self-executing Provisions.**—[In accordance with the rule that fractions of a day are not to be

<sup>251</sup> Cooley, C. L., 197, and cases there cited to which may be added Franklin Co. v. State, (Fla.) Feb. 15, 1888.

<sup>252</sup> *Re Woolsey*, supra. As to the waiver of the constitutional right of trial by jury, see Cooley, C. L., 217.

<sup>253</sup> Cooley, C. L. 156, etc.

<sup>254</sup> Id. 240-241.

<sup>255</sup> See Id. 224, and note.

<sup>256</sup> Id. 211, etc. Comp. Coates

v. Campbell, (Minn.) 35 N. West. Rep. 366. And as to the presumption against unconstitutionality, see ante, § 527, and §§ 178, et seq., and cases there cited, to which may be added Stump v. Hornback, (Mo.) 6 S. West. Rep. 356.

<sup>257</sup> See ante, §§ 449, et seq.

<sup>258</sup> Eatleys' App., ante, § 521.

<sup>259</sup> Branch v. Haas, 16 Fed. Rep. 53.

regarded, a constitution or constitutional amendment is ordinarily to be deemed in force on the whole of the day of its adoption by the vote of the people.<sup>260</sup> But, in a case where the vote of a township authorizing the issue of certain bonds was past on the same day as, but prior to the closing of the polls for, an election that resulted in the adoption of a new constitution prohibiting such issue, it was held that the court would consider the fractions of a day, and as the constitution could not take effect until the close of the voting, the issue was held valid.<sup>261</sup> And it would seem that this decision should furnish the proper rule for determining when a constitution should be deemed in force with reference to subjects as to which it changes previously existing rights and duties.

§ 540 [A delicate question sometimes arises in the interpretation of constitutional provisions, which, whilst this treatise has no proper place for its extended consideration, may yet be here briefly referred to,—whether or not they are self-executing. It is laid down: “A constitutional provision may be said to be self-executing if it supplies a sufficient rule by means of which the right given may be enjoyed or protected, or the duty imposed may be enforced; and it is not self-executing where it merely indicates principles, without laying down rules by means of which those principles may be given the force of law.”<sup>262</sup> Thus, a constitutional provision, that, in all elections for directors or managers of a corporation, each member may cast for one candidate all the votes he is entitled to cast, is self-executing.<sup>263</sup> A provision that “all taxes shall be uniform” and “levied under general laws,” is not self-executing, and therefore does not repeal any special and local tax laws.<sup>264</sup> Indeed, whether or not a constitutional provision is to be given the effect of repealing, by itself, and without further legislation, existing statutes, is one as to which no absolute rule can, it seems, be formulated. It has been said,

<sup>260</sup> Schall v. Bowman, 62 Ill. 821.

<sup>261</sup> Louisville v. Sav. B'k, 104. U. S. 469.

<sup>262</sup> Cooley, C. L., 100.

<sup>263</sup> Pierce v. Com'th, 104 Pa. St. 150.

<sup>264</sup> Lehigh Iron Co. v. Lower Macungie, 81 Pa. St. 482.

that, where a particular proceeding, authorized by a former statute, is prohibited by a constitution, the statute is to be deemed abrogated, and that, if an act would be unconstitutional if passed after the adoption of the constitution, because of inconsistency with it, it is annulled by the constitution if in existence at the time of the latter's adoption.<sup>305</sup> But the question, in every case, would seem to be one of intention, to be considered in the light of the evil to be remedied or guarded against by the provision.<sup>306</sup>

<sup>305</sup> *Hills v. Chicago*, 60 Ill. 86.

<sup>306</sup> *Lewis v. Hollahan*, 103 Pa. St. 425, 430. See, for discussions of this subject, the case just cited; *Allegheny Co. v. Gibson*,

90 Pa. St. 397, 408-413; *Cooley*, C. L., 98-102; *Bish.*, *Wr. L.*, §§ 11a, note, 92b; and comp. ante, § 520, and § 218, note 37.



## ADDENDA.

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SEE § 77, p. 104, note 45.—Under a statute enabling married women to maintain, without joinder of their husbands, actions for the “recovery and protection” of their property, it was held, in *Castner v. Slaker*, 43 *N. J. Eq.* 8; 9 *Centr. Rep.* 45, that a married woman who had acquired an interest as tenant in common in certain real estate, might alone maintain a proceeding for partition.

— § 79, p. 108, note 71.—Under a statute declaring that no “grant in fee or of a freehold estate,” not duly acknowledged or attested in a prescribed manner, should, until so acknowledged, etc., take effect as against “a purchaser or incumbrancer,” it was held, in *Nellis v. Munson*, (N. Y.) 11 *Centr. Rep.* 449, that the creation of a right to bring water in pipes over the land of one for the benefit of another was within the words “grant in fee,” etc.; and (following *Chamberlain v. Spargur*, 86 *N. Y.* 603) that “purchaser or incumbrancer” included all subsequent grantees with or without notice.

— § 114, p. 155, note (b).—Compare as to the American doctrine upon this subject: *Cooley, C. L.*, 779–780 (\* 620) and 1 *Dill., Mun. Corp.* (3rd ed.) § 196, and cases referred to. It can scarcely be said that the understanding upon this point is entirely settled in this country. The most acceptable view is probably that expressed in 1 *Dill. ubi supra*: “Unless the votes for an ineligible person are expressly declared to be void the effect of such a person receiving a majority of the votes cast is, according to the weight of American authority, and the reason of the matter (in view of our mode of election, without previous binding nominations, by secret ballot, leaving each elector to vote for whomsoever he pleases), that a new election must be held, and not to give the office to the qualified person having the next highest number of votes.”

— § 150, p. 209, note (c).—The Pennsylvania liquor law of 13 May, 1887. “An act to restrain and regulate the sale,” etc., places the granting of licenses in the hands of the court of Quarter Sessions,

and provides that the same "shall hear petitions from residents of the ward, borough or township, in addition to that of the applicant, in favor and remonstrances against the application for such license, and in all cases shall refuse the same whenever in the opinion of the said court, having due regard to the number and character of the petitioners for and against such application, such license is not necessary for the accommodation of the public and entertainment of strangers or travelers, or that the applicant or applicants is or are not fit persons to whom such license should be granted." The refusal of the court of Q. S., in the absence of any remonstrance and without assigning any reason, to grant the application for renewal of license of a person admittedly of unexceptionable character, whose petition was properly presented and fortified by an additional recommendation signed by fifty-four business men of his neighborhood, was made the basis of an application to the Supreme Court for a mandamus to compel the granting of the same. In denying the writ prayed for, that court, *per* Paxson, J., said, after referring to the title as showing the act to be one in restraint of the liquor traffic: "It is an error to suppose that the sole duty of the court is confined to the inquiry whether the applicant is a citizen of the United States and a man of good moral character. Back of all this lies the question whether the petitioner's house is "necessary for the accommodation of the public and entertainment of strangers and travelers," and the plain duty of the court of Quarter Sessions under the act of Assembly is to so exercise its discretion as to "restrain" rather than increase the sale of liquors. Thus, if a ward has 100 public houses where only fifty are required by the public wants, it is plain that fifty houses must be denied license, although every one of the applicants is a worthy man and keeps a respectable house. The denial of license under such circumstances may seem arbitrary. The trouble is there are more persons who want to sell liquor than the Legislature considered it for the public good to license for that purpose. I will not consume time with an extended discussion of the right of the judges of the court of Quarter Sessions to exercise their discretion in the granting of licenses. It has been exercised by that court almost time out of mind, and the power has again and again been affirmed by this court. This discretion, however, is a legal discretion, to be exercised wisely and not arbitrarily. A judge who refuses all applications unless for cause shown errs as widely as the judge who grants all applications. We have no doubt the court may in some instances act of its own knowledge. The mere appearance of an applicant for license, when he comes to the bar of the court, may be sufficient to satisfy the judge that he is not a fit person to keep a public house. While the act of deciding in such cases is perhaps quasi-judicial, the difference between granting or withholding a license and the decision of a question between parties to a private litigation is manifest. Neither the petitioner nor any other person in this state has any property in the right to sell liquor. Were we to grant the alternative mandamus now prayed

for it would result only in a return thereto by the judges of the court below that they have considered the application of the petitioner, and in the exercise of the judicial discretion conferred on them by law, have rejected it. Under all our cases such a return would be conclusive and it would lead to no profitable result to allow the writ. It is therefore denied." *Raudenbusch's Petition*, 21 W. N. C. (Pa.) 432, Comp. § 431.

SEE § 169, p. 233, note (b).—In Pennsylvania it was held that the refusal by a foreigner, who had arrived and become domiciled there, to receive and provide for his wife who followed him thither, was a virtual turning her out of doors, and gave the courts of that state jurisdiction, under its laws, to decree her alimony. "Our statute," says Gibson, C. J., "is a municipal regulation for the protection of the community as well as the wife . . . It is proper, therefore, that [the husband,] and not the community, bear the burthen of her support." *McDermott's App.*, 8 Watts & S. (Pa.) 251, 256.

— p. 235, note 114.—In the absence of expressions to the contrary, acts made causes of divorce by statute, are exclusively acts arising within the state: *McDermott's App.*, *supra*; *Bishop v. Bishop*, 30 Pa. St. 412. And where such statute permits divorces for certain causes arising "in any other state," this refers only to states of the Union, not foreign countries: *Bishop v. Bishop*, *supra*. Nor can a decree of divorce, pronounced by the court of such state, under such a statute, have any extra-territorial effect upon a non-resident respondent who was not brought within the jurisdiction of the court by lawful service and notice: *Love v. Love*, 10 Phila. (Pa.) 453. A statute, however, declaring, that, upon due proof at the return of the subpoena, "that the same shall have been served personally on the said party [respondent], wherever found," etc., the cause may be brought to a hearing and a decree made, cannot be so construed as to give a state court extra-territorial power to bring within its jurisdiction the person of a citizen and resident of another state by a personal service upon him outside of the state of said court: *Ralston's App.*, 93 Pa. St. 133. On the other hand, the refusal of a wife to accompany her husband to a foreign country is not, in itself, a wilful and malicious desertion within the meaning of a statute allowing absolute divorce for such cause: *Bishop v. Bishop*, *supra*.

— p. 236, note (c).—A Pennsylvania statute which made it a misdemeanor for the cashier of "any bank" to engage in any other business, was held to refer only to cashiers of banks created under and by the virtue of the laws of that state, and not to cashiers of national banks: *Allen v. Carter*, (Pa.) 11 Centr. Rep. 673. (See the briefs in that case for collection of authorities.)

— § 173, p. 238, note 120. See, in this connection, also: *Mott v. Pa. R. R. Co.*, 30 Pa. St., 9, 27, et seq., to the effect that one Legislature may not alienate the right of taxation so as to bind future Legislatures.

SEE § 196, p. 265, note 80.—Add, to same effect, *Goodall v. People*, (Ill.) 12 *West. Rep.* 824, and see *State v. Duval Co.*, (Fla.) 3 *So. Rep.* 198, that an amendment purporting to set out all that the act, as amended, is designed to contain, repeals all of the original act that it omits.

— § 216, p. 288, note 18.—On the principle that general legislation upon any subject must give way to later inconsistent special legislation upon the same, it was held, in *St. Johnsbury v. Thompson*, (Vt.) 4 *N. Engl. Rep.* 509, that the charter of an incorporated village, authorizing it to “regulate” its victualing houses, repealed by implication, as to it, the general law on that subject.

— § 247, p. 328, note (a).—The provision of 22 & 23 Car. 2, requiring in “all actions of trespass, assault and battery and other personal actions,” where the verdict is under 40 shillings (\$5.33 $\frac{1}{3}$ ), the certificate of the judge to give plaintiff full costs to be made “at the trial of the cause,” permits it to be made at any time between verdict and final judgment: *Simonds v. Barton*, 76 *Pa. St.* 434; nor does the provision extend to any actions, save trespass quare clausum fregit and for assault and battery: *Ibid.*; and where the question of the entry of judgment is to be settled by the same judges who tried the cause, *semble*, that the formal certificate is not required, but costs may be allowed or withheld according to the facts resting in the personal knowledge of the judges: *Knabb v. Kaufman*, 1 *Woodw.* (Pa.) 325

— § 347, p. 481, note 127.—The term “costs” ordinarily includes officers’ fees, as well as the party’s own charge for witnesses: *Delong v. R. R. Co.*, 1 *Woodw.* (Pa.) 195.

— § 350, p. 485, note (a).—As to whether natural gas is “freight,” and the conducting of it through pipes “transportation of freight,” see *Carothers v. Philad’a Co.*, (Pa.) 11 *Centr. Rep.* 48. (See this case also as to the effect of the use of the word “trade” in the preamble on its construction in the body of the act.) *Comp.* § 353.

— § 521, p. 734, note 125.—In 1874, the Legislature of Pennsylvania passed an act for the incorporation and regulation of cities, the operation of which upon existing cities was, by one of its sections, confined to such as might choose to adopt it. These were empowered by the act to assess the cost of grading, etc., streets upon the properties fronting thereon, authorized to file liens for the amount against them, and to proceed to collect the same by scire facias, etc. A lien was filed under the act by the city of Reading in 1886. In 1887, the Supreme Court, in *Scranton Sch. Distr. App.*, 113 *Pa. St.* 176, having declared option legislation as to cities special and unconstitutional, a new municipal law was enacted intended to comply with the principles of general legislation announced by the courts. One of its sections provided that “all taxes levied or assessments made in any of said cities . . . within five years next preceding the date of the approval of this act, are hereby made valid and said cities are



hereby authorized and empowered to collect the same." An application to strike off the lien referred to was granted by the court of Common Pleas, on the ground that the "Général Assembly cannot by an enabling act indirectly make that constitutional which directly is prohibited as unconstitutional. Such legislation is just as obnoxious as the original Act." And the decision was sustained *per cur.* in the Supreme Court, in *Reading v. Savage*, decided April 30, 1888.



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